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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1607

HARRY R. HUGHES, SECRETARY OF TRANSPORTATION, STATE OF MARYLAND, ET AL.,

Appellants,

v.

ALEXANDRIA SCRAP CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLEE

OPINION BELOW

A three-judge panel of the United States District Court for the District of Maryland rendered an opinion which is reported at 391 F. Supp. 46 (1975). The opinion is reprinted in full beginning at page 1a of the Appendix to the Jurisdictional Statement (AJS 1a-31a).

JURISDICTION

Jurisdiction to entertain this appeal is premised on 28 U.S.C. §1253. The judgment of the District Court was entered on March 12, 1975 (R. 356). This Court noted probable jurisdiction on October 6, 1975.

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3):

> The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes * * *.

The Equal Protection Clause of the United States Constitution (Fourteenth Amendment, Section 1):

> * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

STATUTES AND REGULATIONS INVOLVED

Section 11-1002.2(f)(5) of the Motor Vehicle Laws of Maryland, 6 Annotated Code of Maryland, Art. 66½, §11-1002.2(f)(5) (1970 Repl. Vol., 1975 Cum. Supp.),[1] as reenacted with amendments by Chapter 465 of the Laws of Maryland effective July 1, 1974 (A. 15A), appears in its full text as follows:

> (5) Notwithstanding any other provisions of this section, any person, firm, corporation, or unit of government upon whose property or in whose possession any abandoned motor vehicle is found, or any person being the owner of a motor vehicle whose title certificate is faulty, or destroyed, or any agent designated and authorized by a unit of government to remove an abandoned motor vehicle from public or private property, may dispose of the motor vehicle to a wrecker or scrap processor without the title and without notification procedures of subsections (a) and (b) of this section, if the motor vehicle is over eight years old and has no engine or is otherwise totally inoperable. In those cases only, a scrap processor whose plant is physically located and operating in this state shall execute an indemnity agreement that shall be filed with the Motor Vehicle Administration. The indemnity agreement shall contain the name, address and signature of the person delivering the vehicle. The indemnity agreement, and the manufacturers serial or identification number shall be acceptable for payment of the full bounty authorized by section 5-205 if the vehicle identified in the indemnity agreement was titled in this state. Otherwise, for the purpose of administering the provisions of this section, the provisions of section 5-205 shall not apply.

[1] Hereinafter, all references to current sections of the Motor Vehicle Laws of Maryland (6 Annotated Code of Maryland, Art. 66½) will be cited only by Section number and Appendix page reference. The pertinent statutes are reprinted in the Appendix (A. 17A-30A).

(A. 29A). The District Court declared the limiting clause of Section 11-1002.2(f)(5), "whose plant is physically located and operating in this State", to be invalid under the Commerce and Equal Protection Clauses and enjoined the enforcement of Section 11-1002.2(f)(5) to that extent (AJS. 31a).

The complete text of Section 5-205 (A. 22A), as well as other current provisions of the Motor Vehicle Laws of Maryland, are contained in the Appendix (A. 17A-30A).

Maryland regulations governing scrap processors, wreckers, and abandoned vehicles, M.A.R.R. §11.02.05, as promulgated by the Motor Vehicle Administration of Maryland pursuant to Section 5-207 (A. 23A), are also set forth in the Appendix (A. 30-38A).

QUESTIONS PRESENTED

Raw scrap metal in the form of automobile hulks is the subject of nationwide dealings. By comprehensive legislation, Maryland regulates the transfer and disposition of Maryland hulks and has licensed the 16 scrap processors to which such hulks may be delivered. Only nine licensed scrap processors operate plants physically located in Maryland, but all 16 are engaged in intense

competition for the purchase of Maryland hulks. Maryland pays a statutory bounty for each hulk delivered for processing, which creates an artificially enhanced value for Maryland hulks in excess of prevailing market prices for scrap metal.

Most of the hulks are abandoned vehicles over eight years old which have no engine or are otherwise totally inoperable. Section 11-1002.2(f)(5) exempts that class of hulks from title and police notification procedures, thus facilitating their prompt disposal for processing. Until that statute was amended in 1974, all exempt hulks were eligible for bounty payments whether processed in Maryland plants or exported for processing in contiguous states.

In 1974, Section 11-1002.2(f)(5) was amended so as to protect Maryland-based processors (1) by requiring their suppliers to indemnify them against claims and (2) by conferring upon them an exclusive right to collect bounties for hulks exempt from title and notification requirements. Because these hulks now commanded artificially enhanced value only if processed in Maryland, the practical effect of the amendment was to discourage their export in interstate commerce and to secure to Maryland processing plants a virtual monoply over the domestic supply of hulks.

The questions presented on this appeal may be reformulated as follows:

1. Whether the Commerce Clause permits a State, in regulating the disposition of vehicular scrap metal, to pay bounties creating an artificially enhanced value for scrap processed in plants "physically located and operating" in that State, for the purpose of protecting its domestic plants against competition and with the practical effect of withdrawing from interstate commerce most of the scrap which was formerly exported for processing in contiguous states?

2. Whether the Equal Protection Clause permits a State, having licensed all scrap processors meeting prescribed criteria, to assert a discriminatory preference in favor of licensees with plants "physically located and operating" within its borders and to deny to licensees similarly situated in every respect (other than plant location) the right to compete with the favored class on equal terms?

3. Whether a three-judge federal court is required to hold a full-dress trial on the merits before enjoining the enforcement of an unconstitutional statute, where the invalidity is apparent on the face of the statute, the material facts are stipulated or undisputed, the points of alleged dispute are immaterial, and all parties are adequately prepared for a prompt adjudication of the merits?

STATEMENT OF THE CASE

According to Appellants, "[t]he material facts surrounding this case are relatively simple". (Br. 4). These "relatively simple" facts are dispatched in a six-page Statement of the Case (Br. 4-9), which, while enviable in its brevity, conveniently glosses over the stipulated and undisputed facts material to this controversy (and especially those which undermine Appellants' contentions). We are obliged to present the record in its necessary detail, as it was presented below.

A. Some Characteristics of the Scrap Metal Industry

Alexandria Scrap Corporation, the Plaintiff-Appellee, is a Virginia corporation which operates extensive scrap metal processing facilities at its plant

in Alexandria, Virginia. Stipulation ¶1, 4 (A. 58A). As a scrap metal processor, Alexandria Scrap Corporation (Alexandria) purchases iron, steel, and nonferrous scrap and processes it into shredded scrap metal or bales for sale, either directly or through brokers, to steel mills and other primary metal producers throughout the United States. Stipulation ¶5 (A. 58A); Affidavit ¶2-3 (A. 74A). In its purchasing, processing and marketing activities Alexandria is engaged in and dependent upon the regular flow of scrap metal in interstate commerce. Stipulation ¶5 (A. 58A); Affidavit ¶6 (A. 76A-77A).

Automobile hulks are a major source of raw scrap metal. Affidavit ¶4-5 (A. 74A-75A). These hulks are converted rapidly into processed scrap by compressing them into bales in a hydraulic press or by shredding them into small chunks of metal in a shredding machine of substantial proportions. Affidavit ¶3 (A. 74A). This heavy equipment has the capacity of processing hundreds of automobile hulks daily. In 1974, for example, Alexandria processed a total of 62,523 hulks — an average of 5,210 per month. Affidavit ¶5 (A. 75A).

In order to participate in the scrap metal industry all scrap processors must invest substantial sums in their heavy equipment. Stipulation ¶10 (A. 59A). As a matter of industrial necessity they must maintain a hydraulic baler and shears, or a shredding machine, or other equipment capable of rendering the scrap acceptable to any smelting operation by the steel mills. Stipulation ¶10 (A. 59A). This equipment often costs in excess of a million dollars and has to be installed permanently at great expense. Stipulation ¶10 (A. 59A). The substantial capital investment required to set up a scrap processing plant has the practical effect of discouraging the entry of new competitors (AJS 22a). Thus in Maryland, where

heavy equipment is required as a statutory pre-requisite to licensing,[2] there are only nine plants located in the entire State which qualify as scrap processors.[3]

Obviously, in order to operate efficiently, all scrap processors need "to feed their extraordinarily expensive equipment"[4] a steady diet of automobile hulks. There is relatively fierce competition among scrap processors for acquisition of the available supply. Stipulation ¶11 (A. 59A); Affidavit ¶8 (A. 78A). Obsolete and abandoned vehicles are purchased in massive quantities, depending upon supply and demand, through a regional network of suppliers — auto wreckers, towing companies, vehicle haulers, government disposal agencies, scrapyard operators, and members of the public generally. Stipulation ¶12 (A. 59A).

Although Alexandria does not operate any processing facilities in Maryland, Stipulation ¶9 (A. 58A), the location of its plant near the Potomac River affords convenient access to Maryland suppliers of abandoned

[2] Stipulation ¶10 (A. 59A). Section 5-202(8) prohibits licensing of a scrap processor unless it maintains a hydraulic baler and shears, or a shredder, or other processing equipment approved by the Motor Vehicle Administration of Maryland (A. 18A) under implementing regulations (M.A.R.R. §11.02.05.44) as having the capability of rendering the scrap acceptable to smelting operations (A. 36A).

[3] These nine are identified in a statistical table (72A), as stipulated by the parties. Stipulation ¶17 (A. 60A-61A). In considering the heavy equipment requirement of Section 5-202(8), the Court of Appeals of Maryland found significance in the fact that only nine Maryland scrap processors have ever been licensed. *Administrator v. Vogt*, 267 Md. 660, 675, 299 A.2d 1, 9 (1973).

[4] *Administrator v. Vogt, supra*, 267 Md. at 675, 299 A.2d at 9. A properly-equipped processor can handle a car per minute and may require as many as 500 hulks per day to achieve peak efficiency. *Id*, 267 Md. at 669-70, 299 A.2d at 6.

vehicles. A substantial portion of Alexandria's trade-in automobile hulks is derived from Maryland sources, which in 1974 accounted for approximately 25,000 vehicles, or precisely 40% of the total number processed by Alexandria in that year. Affidavit ¶5 (A. 75A). Alexandria purchases these vehicles upon delivery to its plant, relying upon independent vehicle suppliers to transport the hulks from Maryland. Affidavit ¶6 (A. 76A-77A). These methods of operation were not altered by Maryland's adoption of licensing and regulatory legislation. Stipulation ¶6 (A. 58A). In 1970, when scrap processors came under the legislation, Alexandria sought and obtained a license which it has maintained continuously, with periodic renewals, to the present time. Stipulation ¶3, 7, 18 (A. 58A, 61A) and exhibit thereto (A. 73A). It is one of the 16 scrap processors authorized by license to acquire and dispose of Maryland-titled vehicles.[5] By obtaining and renewing its license, Alexandria preserved its access to the flow of automobile hulks from Maryland sources. Affidavit ¶9 (A. 79A).

Competition among scrap processors for available supplies of hulks is intensified by violent ups and downs in the market for scrap metal. Stipulation ¶11 (A. 59A). The market value of automobile hulks is heavily dependent upon the prices steel mills are willing to pay for the processed scrap, which in turn is influenced by national and international economic conditions over which Maryland has no control. Stipulation ¶11 (A. 59A). Because there is no central exchange or clearing house for processed scrap, its price is not readily ascertainable on a daily basis. Affidavit ¶17 (A. 83A). Contracts to supply scrap are of short-term duration

[5] Of these 16, Alexandria and six Pennsylvania scrap processors do not operate plants located in Maryland. Stipulation ¶9 (A. 58A-59A).

and the price is dictated by the steel mills, depending entirely upon their requirements in that commodity. Affidavit ¶17 (A. 82-83A). When the mills do not need scrap, the market evaporates. When demand runs high, the mills pay no more than the prevailing market price. Affidavit ¶17 (A. 83A).

Consequently, basic survival in the scrap processing business hinges upon ability to buy old cars at the right time, at the right place, and in the right quantity. Affidavit ¶17 (A. 83A). Although the price of scrap remains subject to wide fluctuations, it has risen dramatically in recent years, attaining record levels in 1974, as technological improvements in processing methods have upgraded the quality of processed scrap and increased its marketability.[6] High prices for scrap tend to accelerate its flow, encouraging the collection of automobile hulks in areas not usually regarded as prime sources. Affidavit ¶16 (A. 82A). It is then that regional competition among scrap processors becomes acute.

B. The Background of Maryland's Legislative Scheme[7]

During its 1967 session, the Maryland Legislature requested the Committee on Taxation and Fiscal Matters of the Maryland Legislative Council to review the growing problem presented by the accumulation of

[6] This phenomenon, which was predicted by the Maryland Legislative Council Committee on Taxation and Fiscal Matters in its 1967 Report (A. 41A), is fully described by Wellemeyer, "For Scrapmen, These Are Tinsel Days," FORTUNE 150, 152-53 (August 1974), a copy of which is filed in the record (R. 204), and reprinted in its entirety, *infra*, at 107.

[7] This Section in its entirety is a verbatim adaptation of the text and footnotes appearing on pages 12-13 of Appellants' Brief.

abandoned and discarded motor vehicles, and to propose legislation to effect a solution to this problem.[8] The Committee reported that "[r]estoring the scrap cycle seems to be the only logical means to rid the countryside of wornout, rusting automobile hulks," and that "the core of the problem was to find ways to speed up the so-called 'scrap cycle'."[9]

> From the evidence presented to the Committee, the objective would seem to be to accelerate the movement of the vehicle from the owner who has decided to discard it, to the auto wrecker who salvages parts and markets the hulk, to the scrap processor who reduces it to scrap marketable at the mills, and finally to the steel mills which convert it into new usable steel.[10]

The Committee went on to say that the optimal movement of discarded vehicles most often bogs down at the wrecker's automobile junkyard. This bottleneck develops because the most profitable part of a wrecker's operation is the sale of usable parts. Because a wrecker's profit margin in the sale of hulks to a scrap processor is so small, any obstruction tends to retard the movement of these vehicles.[11] Some of these obstructions to the free flow of automobile hulks resulted from technological advances in the steel industry which had reduced the market for the kind of scrap that comes from discarded motor vehicles, and the fact that motor vehicle titling laws, and other legal

[8] The Legislature's request was made in the form of Senate Joint Resolution 57, Laws of Maryland, 1967.

[9] Maryland Legislative Council Committee on Taxation and Fiscal Matters 1967 Report 60 (A. 40A).

[10] *Id.* (A. 40A-41A).

[11] *Id.* (A. 41A).

technicalities, frequently cause wreckers to hesitate handling abandoned vehicles.[12]

The Committee recognized that it actually had to address two problems: (1) abandoned motor vehicles, and (2) the accumulation of motor vehicles in junkyards. Owners of worn-out vehicles often abandoned them because it was cheaper and easier than delivering them to an auto wrecker. Wreckers tended to accumulate large numbers of abandoned vehicles in unsightly junkyards because it was a simple means of maintaining inventories of profitable parts, and because there was little, if any, financial inducement to remove the vehicles to a scrap processor.[13]

Remedial legislation was proposed as a means of tackling the problem. The Committee concluded that auto wreckers play a vital role in the disposal of discarded motor vehicles, and that they should be encouraged to handle as many of these vehicles as possible. However, it was felt that wreckers must also be persuaded to move these vehicles into the scrap cycle as soon as practicable after salvaging usable parts.[14]

[12] *Id.* at 60-61 (A. 41A-42A). [In addition, however, the Committee noted: "Technological improvements in the processing of scrap offer some prospect of a better quality of scrap and hence a better price for the product. The shredding process was described to the Committee. A report by the U. S. Department of Commerce *(Iron and Steel Scrap Consumption Problems,* Page 26) says this process, which removes contaminants without burning 'apparently will be the method used to process the bulk of these materials in the future'." *Id,* 60 (A. 41A). In fact, Alexandria utilizes the shredding process and maintains "a shredding machine of substantial proportions." Affidavit ¶3 (A. 74A).]

[13] *Id.* at 61 (A. 42A).

[14] *Id.* at 62 (A. 43A). [In fact, the proposed legislation was vetoed by then-Governor Spiro T. Agnew, who urged creation of a fund "by which the State could furnish an incentive to those in the business to take scrapped vehicles at the end of

C. The Legislative Scheme Prior to July 1, 1974

From its very inception, therefore, remedial legislation was designed to accelerate the movement of automobile hulks into the "scrap cycle" by removing all unnecessary obstructions and by creating incentives for disposal to scrap processors. The Committee's recommendations were adopted when the Maryland Legislature, in its 1969 session, enacted Chapter 556, Laws of Maryland, 1969. This legislation became effective on January 1, 1970 (A. 17A) and provided, *inter alia*, for:

1. The licensing and regulation of scrap processors.[15]

2. The licensing and regulation of certain auto wreckers,[16] including a semi-annual $5.00 assessment for each vehicle 10 model years or older retained in a wrecker's junkyard for more than one year.[17]

3. A uniform, statewide procedure[18] for the identification and disposal of abandoned motor vehicles, includ-

their useful life." A. 55A. In its 1968 Report, the Committee reaffirmed its position "that the wrecker should be persuaded to move vehicles in to the scrap cycle as rapidly as possible" and "move vehicles to scrap processors within a reasonable length of time." A. 53A.]

[15] I.e., "an establishment having facilities for processing iron, steel and nonferrous scrap metal and whose principal product is scrap iron, steel and nonferrous scrap for resmelting purposes only." Section 5-201.1(a) (A. 17A).

[16] I.e., those "engaged in the business of purchasing or otherwise acquiring vehicles for the benefit of the materials contained therein or the parts thereof". Section 5-201(b) (A. 17A).

[17] Section 5-203(d) (A. 20A).

[18] "It is the sense of the General Assembly that the provisions of this subtitle shall be uniform throughout the State and shall supersede any local law inconsistent herewith." Section 5-209 (A. 23A).

ing those which are eight years old and totally inoperable.[19]

4. The payment by the Motor Vehicle Administration of Maryland of a statutory bounty for the destruction by licensed scrap processors of each vehicle formerly titled in Maryland.[20]

1. *Licensing and regulation of scrap processors.*

Scrap processors must be licensed by the Administration in order to participate in the disposal of Maryland hulks. By very definition,[21] as used throughout the legislative scheme, a scrap processor is one "which is licensed under the provisions" of Section 5-202. That section prescribes the criteria: the license applicant must conduct its business at a fixed location, provide a storage area sufficient to accommodate at least 25 vehicles to be scrapped, maintain records and books of account in a substantial office, advertise its location to the public and, above all, maintain "a hydraulic baler and shears, or a shredder, or such other equipment suitable for processing motor vehicle scrap" as the Administration may prescribe. Section 5-202 (A. 18A).[22] Each scrap processor's location is open to inspection by a representative of the Administration prior to the issuance of a license. M.A.R.R. §11.02.05.36 (A. 35A). If a license is issued, it must be renewed annually, accompanied by a fee of $100. Section 5-202(6) (A. 18A). In addition, a licensed processor must keep accurate

[19] Section 11-1002.2(f)(5), as it appeared prior to its 1974 amendment, *infra* at 22.

[20] Section 5-205 (A. 22A).

[21] Section 5-201.1(a) (A. 17A).

[22] These statutory requirements are detailed further in administrative regulations, M.A.R.R. §11.02.05.35 et seq. (A. 35A-36A).

and complete records of all transactions for at least three years and these records may be inspected at any time during normal business hours. Section 5-206 (A. 22A-23A), as implemented by M.A.R.R. §11.02.05.43 (A. 35A). The license may be revoked, after notice and hearing, for violation of any statute or regulation promulgated by the Administration. Section 5-601 *et seq.* (A. 23A-24A).

It should be observed that the licensing provisions draw no distinction between scrap processors operating plants located in Maryland and those which do not. All processors, wherever located, are required only to submit to licensing, operate the requisite heavy equipment and "facilities for processing iron, steel, and nonferrous scrap metal", conduct that business "at a fixed location", and maintain "a substantial office in which books of account and records of such business are kept". Sections 5-201.1(a); 5-202(2), (4), (8) (A. 17A-18A). A regulation requires each scrap processor not located in Maryland to maintain an office within the State which has been approved by the Administration. M.A.R.R. §11.02.05.45 (A. 36A). Maryland and non-Maryland processors are licensed on equal terms and, once licensed, stand on the same footing with respect to license fees, government inspection, record-keeping, and procedural requirements.

As a practical matter, the Administration has licensed seven scrap processors, including Alexandria, which operate no facilities located in Maryland. Stipulation ¶9 (A. 58). All seven of them are located in states contiguous to Maryland and function as active participants in the "scrap cycle".[23] As an original

[23] Based upon bounty payments to all scrap processors during the four years ending June 20, 1974, as stipulated, out-of-state processors have processed 23.55% of the automobile hulks. Stipulated table III (A. 66A-67A).

licensee under the statute, Alexandria has satisfied all criteria by maintaining its license continuously and by processing Maryland vehicles acquired pursuant thereto. Stipulation ¶7 (A. 58A). It maintains an office in Silver Spring, Maryland, in compliance with regulations. Stipulation ¶8 (A. 58A). Although licensing has subjected Alexandria to regulatory burdens which did not exist prior to the legislation,[24] these are burdens common to all licensed scrap processors and have not altered Alexandria's methods of operation. Stipulation ¶6 (A. 58A). In short, Alexandria enjoyed the same freedom of competition as it did before, at least prior to the disabling amendment to Section 11-1002.2(f)(5).

2. *Licensing and regulation of wreckers.*

As noted by the Committee on Taxation and Fiscal Matters, the accumulation of motor vehicles in unsightly salvage yards posed serious environmental problems. Because the sale of usable spare parts is the most profitable aspect of the wrecking business, certain wreckers tended to accumulate large numbers of automobile hulks primarily for their inventory of parts (A. 41A-43A). The Maryland legislature addressed this problem in enacting Chapter 556. Indeed, the "underlying purpose" of the legislation, as subsequently declared by the Court of Appeals of Maryland, "was to arrest the problems developing from the storage of old

[24] "Prior to the 1969 enactment, wreckers and scrap processors were subjects of modest regulation under the Motor Vehicle Code, and surely were not part of a comprehensive scheme. Such regulation as did exist was aimed at them almost entirely with respect to the titling and registration of vehicles. In fact, it not only appears that scrap processors had been previously unmentioned by that name, but also they were largely ignored in the original [1969] version of Chapter 556, which dealt mainly with wreckers before the bill was amended [in 1970]." *Administrator v. Vogt*, 267 Md. 660, 667, 299 A.2d 1, 5 (1973).

automobiles, which had become a cause for concern in terms of environmental health." *Administrator v. Vogt*, 267 Md. 660, 670, 299 A.2d 1, 6 (1973).

As part of this purpose, Section 5-201 makes it unlawful after January 1, 1970, "to store any vehicle, or body or chassis thereof, which is to be scrapped, dismantled, or destroyed, on any private property for a period of thirty days" unless a license is obtained from the Administration (A. 17A). A wrecker must be licensed if it is "engaged in the business of purchasing or otherwise acquiring vehicles for the benefit of the materials contained therein or parts thereof." Section 5-201.1(b) (A. 17A). The criteria for licensing, suspension, and revocation parallels that which is applicable to scrap processors,[25] but two regulatory features are directed against wreckers alone. First, a $5.00 assessment is levied upon each 10-year old hulk which is not scrapped within one year after the wrecker acquires it. Section 5-203(d) (A. 20A).[26] Second, "it is unlawful for a wrecker to store vehicles for salvage or demolition at a density of more than 250 vehicles for any one acre". Section 5-208 (A. 23A).

Because salvage yards may accumulate up to 250 vehicles per acre, licensed wreckers are a frequent source of automobile hulks. Most of the hulks delivered to scrap processors may be classified as eight years old

[25] By their express terms, Sections 5-202 (licensing requirements), 5-206 (record-keeping), and 5-601 et seq. (license revocation and suspension) apply to wreckers and scrap processors alike (A. 18A, 22A-24A). See also administrative regulations applicable to wreckers, M.A.R.R. §11.02.05.01, et seq. (A. 30A-34A).

[26] It was this statutory assessment which was at issue in *Administrator v. Vogt, supra.*

and totally inoperable.[27] On the average, this category of hulks accounts for 96% of all vehicles which Alexandria acquires from Maryland sources. Affidavit ¶8 (A. 78). Licensed wreckers delivered 1,934 hulks in that category during the first half of 1974. Affidavit ¶7 and table (A. 77A).

Although licensed wreckers thus constitute one source of supply, they hold only a fraction of the Maryland vehicles available for scrapping. The sale of salvageable parts, rather than the hulk, is the most profitable phase of the wrecking business.[28] Older vehicles have minimal value to wreckers as sources of replacement parts. Appellants' Br. 14, n. 21. Such vehicles are subject to assessment under Section 5-203(d) and count against the 250-per acre maximum.

By legislative definition, licensed wreckers store vehicles for 30 days or more for benefit of their materials and parts. Sections 5-201, 5-202.1(b). They are distinguishable as such from a host of towing services, vehicle haulers, and government agencies which remove vehicles abandoned on the streets and parking lots for immediate disposal, rather than accumulate them for their parts. This category of unlicensed vehicle suppliers is a recognized source of supply to scrap processors. Stipulation ¶12 (A. 59A); Gittelson affidavit ¶7, 11, 13-14 (A. 77A, 79A-81A); Harris affidavit ¶1 (A. 84A).

[27] This is a statutory classification. Sections 5-203(b), 11-1002.2(f)(5). (A. 19A, 29A).

[28] As noted by the Committee on Taxation and Fiscal Matters (A. 41A) and the Court of Appeals of Maryland in *Administrator v. Vogt, supra*, 267 Md. at 669, 299 A.2d at 6.

In Alexandria's experience, these unlicensed suppliers constitute the most important and dependable source of its supply of automobile hulks. During the six-month period prior to July 1, 1974, the effective date of the amendment to Section 11-1002.2(f)(5), Alexandria processed a grand total of 32,648 automobile hulks. Of this total, 14,943 were acquired from Maryland sources and nearly all of these (14,253) were over eight years old and totally inoperable. By delivering 12,319 of such hulks to Alexandria's plant, *unlicensed suppliers thereby accounted for no less than 86.4% of all eight year old and inoperable vehicles delivered from Maryland during that period.* Even more remarkable is the fact that the 12,319 hulks delivered by *unlicensed suppliers* constituted 37.7% of Alexandria's *entire* production during the period. The supply by that source alone was regular and dependable. In every single month during that period, at least one-third of the vehicles processed by Alexandria were Maryland hulks acquired from unlicensed suppliers.[29]

[29] All the statistics and percentages contained in this paragraph are derived from figures in the tables set forth in Affidavit ¶5, 7, and 8 (A. 75A, 77A, 78A). For the Court's convenience, the figures covering the first six months of 1974 are listed below:

Months (1974)	*Total Hulks Processed (All Sources)*	*Hulks From Maryland Sources Only*	*8 Year Old Inoperable Md. Hulks*	*Delivered by Unlicensed Suppliers*
January	4,958	2,528	2,488	2,128
February	4,471	2,290	2,233	1,819
March	6,503	2,541	2,454	2,268
April	6,509	3,422	3,007	2,499
May	5,826	2,335	2,302	2,114
June	4,381	1,827	1,769	1,491
TOTAL:	32,648	14,943	14,253	12,319

The percentages are computed by simple arithmetic, i.e., 12,319 is 37.7% of 32,648, 82.4% of 14,943, and 86.4% of 14,253.

3. *Statutory procedures for vehicle disposal.*

Because "titling of motor vehicles and other legal technicalities" have a recognized tendency to retard the disposal of abandoned cars (A. 42A), the Maryland Legislature authorized five[30] basic methods of transfer:

(1) A vehicle owner or his assignee may endorse a valid Certificate of Title. Section 5-203.1 (A. 20A-21A).

(2) Anyone in possession of an abandoned vehicle may apply to any police department which, after giving prescribed three-week notices, may issue a police Certificate of Authority to deliver the vehicle for scrapping. Section 11-1002.2(f)(1-4) (A. 28A-29A).

(3) The purchaser of an abandoned vehicle at a police department auction may obtain a sales receipt (Auctioneer's Bill of Sale) which permits him to deliver the vehicle for scrapping. Section 11-1002.2(a-d) (A. 25A-27A).

(4) A licensed wrecker may assume ownership of vehicles in his possession, upon compliance with specified procedures, and deliver those vehicles for scrapping pursuant to his wrecker's Certificate of Disposal. Section 5-203(b-c) (A. 19A-20A).

(5) Anyone in possession of an abandoned vehicle may deliver it for scrapping, without documentation, if it is eight years old and totally inoperable. Section 11-1002.2(f)(5) (A. 29A).

The first three methods — Certificate of Title, police Certificate of Authority, and Auctioneer's Bill of Sale — may be treated summarily because, in practice, they are

[30] Appellants list only four methods in text, but mentions the fifth (wreckers certificate of disposal) in a footnote (Br. 6, n.7).

of marginal utility. Vehicles delivered for scrap processing are rarely accompanied either by unencumbered Certificates of Title or by police Certificates of Authority.[31] The latter method is wholly dependent upon local police departments and the willingness of vehicle suppliers to submit to the procedural burdens and three-week delays imposed by statute.[32] In fact, prior to July 1, 1974, the police Certificate of Authority was seldom used by anybody as a method of transferring vehicles to scrap processors. Stipulation ¶16 (A. 60A); Affidavit ¶15 (A. 81A). Nor is it used now.[33] Although the third

[31] Only 352 of the vehicles acquired by Alexandria in 1974 were documented either by Certificates of Title or by Police Certificates of Authority, accounting for less than 2% of all Maryland hulks processed by Alexandria. Affidavit ¶12 and table (A. 80A). The reference to "VR-20" in that table is to the police Certificate of Authority (Form VR-20). See Stipulation ¶15 (A. 60A).

[32] The procedures are set forth in subsections (a), (b), and (f) (1-4) of Section 11-1002.2 (A. 25A-29A). Under subsection (f)(2), an applicant for a police Certificate of Authority must fill out a detailed affidavit and execute an affidavit swearing to its truth. If the police department approves the application, then it is required by subsection (f)(3) to follow the notification procedures set forth in subsections (a) and (b). The applicant must then wait while the police give three weeks notice by registered mail to the last known owner and all known lienholders, as required by subsection (a). If none are known, or if the mailed notice is returned undelivered, subsection (b) requires the police to publish the notice in a local newspaper. Then, if the vehicle is not reclaimed in accordance with subsections (a) and (b), the police are authorized by subsection (f)(4) to issue the requested police Certificate of Authority (assuming, of course, that the applicant is still interested in obtaining the abandoned vehicle in question).

[33] Affidavit ¶15 (A. 81A-82A). During the first six months of 1974, Alexandria acquired a combined total of 173 vehicles under Certificates of Authority (Form VR-20) and Certificates of Title. In the last six months of 1974, that total was merely 179 — a net increase of six vehicles. Affidavit ¶12 and table (A. 80A).

method, the Auctioneer's Bill of Sale, is a somewhat more productive source of automobile hulks, it is limited by the number of vehicles held in police custody and further depends upon the bidding success of those who participate in police auctions. In 1974, less than 8% of the Maryland vehicles acquired by Alexandria were documented by Bills of Sale.[34]

The fourth method, involving a Wrecker's Certificate of Disposal, is of primary importance to licensed wreckers. In brief, it enables a licensed wrecker to acquire a vehicle without obtaining Certificate of Title or a police Certificate of Authority and to assume full ownership, after compliance with subsections (b) and (c) of Section 5-203 (A. 18A-20A). The wrecker retains a multi-copy Certificate of Disposal in his file until he elects to dispose of the vehicle, at which time he assigns the Certificate to a scrap processor permitting the vehicle to be scrapped; another copy is sent to the Administration so as to report that the vehicle is no longer in the wrecker's inventory. Stipulation ¶15 (A. 60A); M.A.R.R. §11.02.05.17-27 (A. 32A-34A). In practice, licensed wreckers utilize the Certificate of Disposal to the virtual exclusion of all other methods of transfer. Affidavit ¶7 (A. 77A). Because licensed wreckers regularly deliver Maryland vehicles to Alexandria's plant, Table in Affidavit ¶7 (A. 77A), the Certificate of Disposal method is encountered with some frequency.[35] However, statutes and regulations expressly restrict its

[34] The column headed "VR-46" in Affidavit ¶12 (A. 80A) refers to vehicles delivered pursuant to the Auctioneer's Bill of Sale (Form VR-46). Stipulation ¶15 (A. 60A). That column lists a total of 1,786 vehicles processed by Alexandria in 1974 which were acquired by Bill of Sale, accounting for 7.4% of the Maryland total for that year.

[35] The "VR-28" figures for 1974 add up to 5,796, indicating that vehicles delivered by licensed wreckers pursuant to Certificates of Disposal represented 24.2% of the total number

use to licensed wreckers. Affidavit ¶7 (A. 77A). The Certificate of Disposal is *not* a method available to the towing services and other unlicensed suppliers which constitute Alexandria's major source of automobile hulks. Affidavit ¶7 (A. 77A).

The fifth and final method available for vehicle disposal is prescribed by Section 11-1002.2(f)(5). Prior to July 1, 1974, when the crucial amendment became effective, it contained the following provisions:

> (5) Notwithstanding any other provisions of this section, any person, firm, corporation, or unit of government upon whose property or in whose possession any *abandoned* motor vehicle is found, or any person being the owner of a motor vehicle whose title certificate is faulty, or destroyed, or any agent designated and authorized by a unit of government to remove an abandoned motor vehicle from public property, may dispose of the motor vehicle to a wrecker or scrap processor *without the title and without notification procedures* of subsections (a) and (b) of this section, *if the motor vehicle is over eight years old and has no engine or is otherwise totally inoperable.*[36]

(23,976) supplied to Alexandria by all methods listed in the table. Table in affidavit ¶12 (A. 80A).

[36] (Italics added). This language is in all respects identical to the first sentence of the current amended version of Section 11-1002.2(f)(5). (A. 29A). First enacted as part of Chapter 556, Laws of Maryland, 1969, it was reenacted without significant change by Chapter 534, Laws of Maryland, 1970; Chapter 502, Laws of Maryland, 1971; Chapter 396, Laws of Maryland, 1972. Chapter 421, Laws of Maryland, 1972, effective July 1, 1972, inserted the words "or any agent designated and authorized by a unit of government to remove an abandoned motor vehicle from public or private property". The language was unchanged thereafter until Chapter 465, Laws of Maryland, 1974, imposed the critical amendment.

The paramount importance of Section 11-1002.2(f)(5) to licensed scrap processors lies in the italicized phrases. Abandoned vehicles which are over eight years old and have no engine (or are otherwise totally inoperable) form a special category. By definition, these are not operable vehicles, but hulks ready for scrapping. This is the category from which virtually all vehicular scrap metal is derived, accounting for 96% of the total which Alexandria has acquired from Maryland sources.

Section 11-1002.2(f)(5) provides towing services and other unlicensed suppliers with their only expeditious and readily available outlet for hulks which have either been abandoned or which bear no title certificate (or both). Police notification procedures do not apply to the described category. Simple possession of an abandoned hulk[37] is all that is necessary to entitle an unlicensed supplier to dispose of it to a scrap processor. Unlike all other methods, Section 11-1002.2(f)(5) expressly *exempts* this class of old and inoperable hulks from all title and notification requirements, thereby eliminating the main obstacles to vehicle transfer — title deficiencies and notification procedures.

However, it was the elimination of those obstacles which engendered concern among licensed scrap processors, in view of their potential liability for claims arising from the destruction of such exempt hulks. As a matter of practice, scrap processors have required persons delivering hulks, unaccompanied by title certificates, or other documentation, to execute a form of indemnity agreement by which the transferor (a) certified that he had a legal ownership of and authority to deliver the hulk, (b) agreed to indemnify the scrap

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[37] Under Maryland law, abandoned property of this sort belongs to anyone who takes possession of it. *Steinbraker v. Crouse*, 169 Md. 453, 458, 182 Atl. 448, 450 (1936).

processor from all liability for claims arising from its destruction, and (c) warranted compliance with Maryland laws and regulations. Stipulation ¶14 (A. 60A). These indemnity agreements were widely used prior to July 1, 1974, while the provisions of Section 11-1002.2(f)(5) were uniformly available to the suppliers of *all* scrap processors, irrespective of location. Stipulation ¶16, 19 (A. 60A, 61A). Indemnity agreements, as executed by Maryland towing services and other unlicensed suppliers, were sufficient documents of title for abandoned vehicles over eight years old and totally inoperable and were routinely accepted by the Administration. Affidavit ¶8, 11 (A. 79A, 80A). During the first six months of 1974, Alexandria processed 14,253 Maryland vehicles of that description, 11,249 or 78.9% of which were exempt hulks acquired from unlicensed suppliers under indemnity agreements. Table in Affidavit ¶12 (A. 80A).

4. *The Bounty*

As an additional incentive for moving automobile hulks to licensed scrap processors, Section 5-205 authorizes the payment, out of a fund specially earmarked for that purpose,[38] of a fee or "bounty" for the disposal of each abandoned vehicle formerly titled in Maryland. Section 5-205 (A. 22A) provides in pertinent part, as follows:

> The Administration shall pay a fee of sixteen dollars ($16.00) for each vehicle which has been completely destroyed upon presentation by the scrap processor to the Administration of the certificate of title or other acceptible evidence of ownership for a vehicle formerly titled in this State, the manufacturer's serial number or identification plate, satisfactory proof that the vehicle has been completely destroyed and any other information the Administration may deem necessary. * * * The Administration shall disburse this fee in the following manner: eight dollars ($8.00) to a scrap processor and eight dollars ($8.00) to the wrecker conveying ownership of the vehicle to be destroyed to such scrap processor. Scrap processors and wreckers must be licensed under this part to be eligible for this fee. * * *

[38] Section 3-830 requires the Administration to collect $2.00 for each certificate of title, $1.00 of which is used for administering the "bounty" provisions of Section 5-205 plus certain unrelated expenses incurred under Section 11-1002.2(d). These fees are deposited in a special account known as the "Abandoned Vehicles Fund" and held for payment of "bounties" under Section 5-205 (as well as the unrelated expenses). 6 Annotated Code of Maryland, Art. 66½, §3-830 (1970 Repl. Vol., 1975 Cum. Supp.).

When first enacted in 1969, Section 5-205 provided for a $10 fee payable to licensed scrap processors alone.[39] However, the "wrecking industry involved itself in the legislative process", leading to an amendment which required the bounty to be divided equally between licensed processors and wreckers.[40] In 1972 the bounty was raised from $10.00 to $12.00 and in 1973 it was increased to the current $16.00 figure.[41] There have been no further amendments to Section 5-205.

Under this bounty arrangement, upon receiving a vehicle from a licensed wrecker, the scrap processor requires the wrecker to assign ownership by endorsement of the wrecker's Certificate of Disposal. M.A.R.R. §11.02.05.23, .24, .27, .48 (A. 33A-34A, 36A). After destroying the hulk by processing, the scrap processor

[39] Chapter 556, Laws of Maryland, 1969.

[40] *Administrator v. Vogt*, 267 Md. 660, 670, 299 A.2d 1, 6 (1973). The statute was amended by Chapter 534, §1, Laws of Maryland, 1970, to provide wreckers with a $5.00 share of the $10.00 bounty.

[41] Chapter 421, Laws of Maryland, 1972; Chapter 114, Laws of Maryland, 1973. Appellants' Br. 15 n.23.

certifies that fact on the Certificate of Disposal and submits it to the Administration for payment of the $16.00 bounty.[42] The Administration is then required to pay the bounty authorized by Section 5-205 by disbursing $8.00 directly to the wrecker and $8.00 to the processor. M.A.R.R. §11.02.05.51 (A, B). (A. 37A).

While the bounty is divided equally between the licensed wrecker conveying ownership and the licensed scrap processor attending to its destruction, the entire sum is paid to the scrap processor for each vehicle which was acquired from any person other than a licensed wrecker. Towing services and other unlicensed suppliers may also participate in the bounty program. Harris affidavit ¶1 (A. 84A). M.A.R.R. §11.02.05.51(C). (A. 37A). When a vehicle is acquired from an unlicensed supplier under an indemnity agreement, the scrap processor is required to fill out a Certificate of Destruction Form VR-124. M.A.R.R. § 11-02.05.51(C). (A. 37A). That form (A. 39A) contains a brief description of the vehicle, the date of its receipt and destruction, and its Maryland title number. Form VR-124 does *not* indicate the place where the vehicle was abandoned. (A. 39A). The processor submits the executed form to the Administration, together with a copy of the indemnity agreement and the vehicle identification number (VIN) plate. These serve as a request for payment of the $16 bounty authorized by Section 5-205. M.A.R.R. §11.02.05.50, .51(c), .52 (A. 37A); Form VR-124 (A. 39A). Prior to July 1, 1974, when the provisions of Section 11-1002.2(f)(5) were uniformly available to suppliers of all scrap processors, indemnity agreements (used in conjunction with Form VR-124) were routinely accepted

[42] Section 5-204 (A. 21A); M.A.R.R. §11.02.05.24, 49 (A. 33A, 36A). As required by Section 5-205, the processor also forwards the vehicle identification number (VIN) plate of the destroyed vehicle. M.A.R.R. §11.02.05.50 (A. 37A).

by the Administration for bounty payment. Stipulation ¶16 (A. 60A); Affidavit ¶11 (A. 80A).

Although licensed wreckers are entitled to an $8.00 statutory share of the bounty, Section 5-205 makes no express provision for unlicensed suppliers. It is an established practice, however, for scrap processors to rebate a major portion of their $16.00 bounties to unlicensed suppliers of bounty-eligible vehicles, as an incentive for future deliveries. Stipulation ¶12 (A. 59A). In practice, before the amendment to Section 11-1002.2(f)(5), Alexandria rebated $14.00 of each $16.00 bounty payment to its unlicensed suppliers who delivered hulks pursuant to indemnity agreements. Affidavit ¶10 (A. 79A). Although not all unlicensed suppliers requested the bounty rebate, most of Alexandria's regular suppliers of bounty-eligible vehicles expected and did receive it. Affidavit ¶11 (A. 79A-80A). Those suppliers were a steady source of vehicles from Maryland and their indemnity agreements were routinely accepted by the Administration for bounty payments on exempt hulks delivered pursuant to Section 11-1002.2(f)(5). Affidavit ¶5, 11 (A. 75A, 80A).[43] The $14.00 rebate was credited to the supplier upon purchase of the hulk, but payment was withheld until actual receipt of the bounty. Other scrap processors, in competition with Alexandria, paid immediate cash rebates to their suppliers for bounty-eligible vehicles and assumed the risk that the Administration would approve their requests for bounty payments. Affidavit ¶10 (A. 79A).

Because of this customary division of the bounty, scrap processors like Alexandria have promoted the

[43] Indemnity agreements are sufficient title documents only for vehicles over eight years old, totally inoperable, and formerly titled in Maryland and are executed only by unlicensed suppliers which regularly haul from Maryland. Affidavit ¶5, 8. (A. 75A-76A, 78A-79A).

legislative purpose by inducing unlicensed suppliers to deliver their vehicles into the "scrap cycle". Stipulation ¶12 (A. 59A-60A). The destruction of Maryland-titled vehicles bestows economic advantages upon scrap processors, licensed wreckers, and unlicensed suppliers which participate in the bounty program. Stipulation ¶12 (A. 59A).

Despite its unique bounty program, however, Maryland is part of a nationwide scrap market. The market value of automobile hulks is heavily dependent upon the prices steel mills are willing to pay for the scrap, which in turn is influenced by national and international economic conditions over which Maryland has no control. Stipulation ¶11 (A. 59A). In Maryland, as elsewhere, this dependence results in relatively fierce competition among scrap processors for the acquisition of available hulks. Stipulation ¶11 (A. 59A). Because of the bounty program, however, scrap processors can no longer acquire Maryland-titled vehicles by merely paying the prevailing market price for scrap metal. Their suppliers also expect to realize bounty shares or rebates for those vehicles and, in order to remain competitive, scrap processors must be able to assure their payment. Competition for bounty-eligible hulks is intense. Affidavit ¶8 (A. 78A).

In its practical operation, the bounty program operates directly upon commerce in Maryland scrap "by artificially enhancing the value of abandoned vehicle hulks in excess of their natural market price". Appellants' Br. 9. However, only hulks formerly titled in Maryland command this "artificially enhanced value",[44] and then only if delivered to scrap processors

[44] See AJS 8a. Appellants also state that the program has created an "artificial value" for hulks (Br. 15), but this terminology is misleading because it implies that hulks have little or no scrap value. The more apt description, "artificially enhanced value", was used by Appellants in their Memorandum in Support of Motion to Dismiss, at 7 (R. 24, 30).

licensed by the Administration and eligible to participate in Maryland's bounty program. Under Section 5-205, Maryland vehicles earn bounties only when destroyed by processors which hold licenses. This has had a profound effect upon those scrap processors which depend, in whole or in part, on the steady flow of old cars from Maryland sources. When the bounty program was enacted by the Maryland Legislature, those scrap processors were obliged to obtain licenses in order to become eligible to receive and distribute bounty payments. Affidavit ¶9 (A. 79A). This ready acceptance of regulation was not surprising, because a licensed processor receiving bounty payments for the destruction of Maryland-titled vehicles was in a position to pay "artificially enhanced" prices for scrapworthy vehicles which were substantially higher than an unlicensed competitor could offer. Affidavit ¶9 (A. 79A). The ready availability of bounty payments was an immeasurable business advantage for participating scrap processors, especially in times when demand exceeded supply and competition for Maryland hulks was at a peak. Affidavit ¶18 (A. 83A). The ability to offer a bounty-generated rebate (i.e., payment of a higher price without added cost to the processor) imparts a distinct competitive edge to those processors fully able to participate in the bounty program. Affidavit ¶18 (A. 83A).

Under the bounty program as it was structured prior to July 1, 1974, the seven licensed processors operating plants in Virginia and Pennsylvania were active participants and continued to compete with the nine Maryland-based processors on terms of relative equality. These seven out-of-state processors received a collective 23.55% share of all bounty payments, based

upon interstate deliveries of Maryland-titled vehicles to their respective plants. Table III (A. 66-67A), as stipulated ¶13, 17 (A. 60A-61A). Alexandria firmly established itself as the leading purchaser of Maryland hulk exports.[45] As an original participant in the bounty program, Alexandria received $219,084 or 13.73% of all payments under Section 5-205 through September 30, 1974, thereby ranking third among the 16 licensed scrap processors.[46]

Participation in the bounty program has not insured success to all participants. Since the program's inception, 99.1% of all bounties have been paid to only ten licensed processors, including Alexandria and two Pennsylvania-based processors. Stipulation ¶13 and stipulated table VI (A. 60A, 72A). Within Maryland, nine scrap processors are licensed but only five have participated to any extent. Two Baltimore-based processors dominate the entire market for bounty-eligible hulks. Together they have collected $900,587 in bounties, or 56.5% of the overall total paid by the Administration.[47]

[45] During the four-year period ending June 30, 1974, Alexandria received 53.71% of all bounties paid to out-of-state processors as a group. In the last year of that period, Alexandria's share climbed to 72.83% of the out-of-state total. Table IV (A. 68A-69A), as stipulated, ¶13, 17 (A. 60A-61A).

[46] Stipulation ¶13 and stipulated table VI (A. 60A, 72A). Half of Alexandria's four-year total was registered during the first nine months of 1974. Stipulated table I (A. 62A-63A). The figures for July, August, and September of 1974, as shown on stipulated tables I, II, and VI (A. 62A-65A, 72A) do *not* represent bounties paid on vehicles *acquired* or processed in those months. They reflect authorized payments to Alexandria during those months, for vehicles previously destroyed. See Stipulation ¶17 (A. 60A-61A).

[47] Stipulated table VI (A. 72A). One of them, United Iron & Metal Co., Inc., has collected more bounty payments than the other eight *combined*. Stipulated Table V (A. 71A).

D. The 1974 Amendment to Section 11-1002.2(f)(5) and Its Impact

Prior to July 1, 1974, Section 11-1002.2(f)(5) contained no reference to indemnity agreements. As a matter of industry practice, licensed scrap processors required their unlicensed suppliers to execute indemnity agreements before purchasing hulks exempt from title and notification requirements, i.e., abandoned vehicles which are over eight years old and totally inoperable. Stipulation ¶14 (A. 60A). Although such agreements were routinely accepted by the Administration for bounty purposes, Affidavit ¶11 (A. 80A), their validity and enforcibility remained uncertain. Statutory recognition of the existing practice was proposed during the 1974 session of the Maryland Legislature (A. 97A). In its original draft, House Bill 782[48] would have authorized *all* licensed scrap processors to file indemnity agreements with the Administration and receive the full bounty under Section 5-205 for every exempt vehicle acquired and processed in accordance with Section 11-1002.2(f)(5).

What emerged from the Legislature was radically different, both in concept and in terms. Chapter 465, Laws of Maryland, 1974, reenacted the former provisions of Section 11-1002.2(f)(5) and adopted the amend-

[48] House Bill 782 would have repealed and reenacted Section 11-1002.2(f)(5) and added the following language:

> A scrap processor may execute an indemnity agreement that shall be filed with the Motor Vehicle Administration. The indemnity agreement shall contain the name, address and signature of the person delivering the vehicle. The indemnity agreement and the manufacturers serial or identification number shall be satisfactory proof that the vehicle has been destroyed and shall be acceptable for payment of the full bounty authorized by Section 5-205.

Chapter 465, Laws of Maryland, 1974 (A. 16A) incorporates this language, but tacks on significant additions.

ment proposed by House Bill 782, but also inserted new language which curtailed its general application:

> (f)(5) Notwithstanding any other provisions of this section, any person, firm, corporation, or unit of government upon whose property or in whose possession any abandoned motor vehicle is found, or any person being the owner of a motor vehicle whose title certificate is faulty, or destroyed, or any agent designated and authorized by a unit of government to remove an abandoned motor vehicle from public or private property, may dispose of the motor vehicle to a wrecker or scrap processor without the title and without notification procedures of subsections (a) and (b) of this section, if the motor vehicle is over eight years old and has no engine or is otherwise totally inoperable. IN THOSE CASES ONLY, A SCRAP PROCESSOR WHOSE PLANT IS PHYSICALLY LOCATED AND OPERATING IN THIS STATE SHALL [[MAY]] EXECUTE AN INDEMNITY AGREEMENT THAT SHALL BE FILED WITH THE MOTOR VEHICLE ADMINISTRATION. THE INDEMNITY AGREEMENT SHALL CONTAIN THE NAME, ADDRESS AND SIGNATURE OF THE PERSON DELIVERING THE VEHICLE. THE INDEMNITY AGREEMENT AND THE MANUFACTURERS SERIAL OR IDENTIFICATION NUMBER SHALL BE SATISFACTORY PROOF THAT THE VEHICLE HAS BEEN DESTROYED AND SHALL BE ACCEPTABLE FOR PAYMENT OF THE FULL BOUNTY AUTHORIZED BY SECTION 5-205 IF THE VEHICLE IDENTIFIED IN THE INDEMNITY AGREEMENT WAS TITLED IN THIS STATE. OTHERWISE, FOR THE PURPOSE OF ADMINISTERING THE PROVISIONS OF THIS SECTION, THE PROVISIONS OF SECTION 5-205 SHALL NOT APPLY.[49]

[49] Chapter 465, Laws of Maryland, 1974 (A. 15A-16A), sets out the amending language in block capitals and underlines the new matter (not contained in House Bill 782).

These further amendments, as underlined above, were engrafted on the only statute which enables unlicensed suppliers to dispose of vehicles over eight years old and totally inoperable, without the title and without police notification procedures. With respect to that specific category of exempt hulks, a vital source of raw scrap metal, the amendments created a unique statutory classification found nowhere else in the legislative scheme or implementing regulations. Every "scrap processor whose plant is physically located and operating in this State" was required to file an indemnity agreement for each exempt hulk, thereby assuring such processor of statutory indemnity against claims and automatic payment of the full bounty authorized by Section 5-205. Otherwise, the bounty provisions were inapplicable to exempt hulks delivered to any other licensed processor in accordance with the amended statute. "When the Maryland Legislature amended the law in 1974, only scrap processors with plants physically located and operating in Maryland were permitted to obtain inoperable eight year old vehicles, upon which bounties would be paid, if an indemnity agreement was executed in favor of the scrapper." Appellants' Br. 15.

There is no legislative history for the 1974 amendments to Section 11-1002.2(f)(5). (A. 99A). The Administration, by its counsel, has disclaimed any responsibility for the new legislation (A. 98A), depicting it as "an eleventh-hour, in-the-halls handwritten amendment" which "dawned on somebody" (A. 97A), resulting in "a very bad statute in terms of draftsmanship" (A. 99A). However, there is no mystery concerning the object of this lobbying effort or the intended beneficiaries. Chapter 465 was enacted for the declared "purpose of protecting *certain* scrap processors who destroy certain

abandoned motor vehicles by authorizing them to file an indemnity agreement with the Motor Vehicle Administration and relating generally to disposition of abandoned motor vehicles." (A. 15A; italics in original).

Chapter 465 was approved by the Governor on April 30, 1974 (A. 16A) and took effect July 1, 1974. In protecting certain scrap processors, the amended section eliminated all others from effective competition. Old and inoperable hulks continued to fetch an "artificially enhanced value" for their suppliers, but only if delivered intrastate to "a scrap processor whose plant is physically located and operating" in Maryland. Old and inoperable hulks exported for processing in contiguous states were ineligible for bounty and sold at much lower prices prevailing on the free market for scrap metal. For towing services and other unlicensed suppliers, in business for profit and attracted by high prices, transactions with licensed processors beyond Maryland's borders now entailed financial sacrifice. Accordingly, their hulks were withdrawn from interstate commerce and delivered for processing within Maryland for the bounty-generated rebates which only Maryland-based processors could provide. Affidavit ¶15 (A. 82A). The latter obtained indemnity and $16 bounties for each vehicle but, more significantly, secured unhindered access to the domestic supply of vehicular scrap.

This economic power, concentrated in the hands of a tiny and readily-identifiable group of Maryland-based processors, had a magnetic effect on bounty-eligible vehicles. Until the District Court intervened with an injunction some months later (AJS 31a-32a), the predictable impact of this scheme upon Alexandria's business was immediate and drastic. This is reflected in undisputed statistics covering its monthly acquisitions

throughout the calendar year.[50] By comparing subtotals for the first six months of 1974 with those for the six months after July 1, 1974 (when the amended statute took effect), the extent of Alexandria's trade losses comes into clear focus.

1. During the first half of 1974, Alexandria acquired 14,943 vehicles exported from Maryland, which constituted 45.8% of all vehicles delivered to its plant during that period. In the second half of 1974 this number *dropped* to 10,066 and the Maryland share of its total business *declined* to 33.79%.[51]

2. In contrast, there was a consistent, uninterrupted flow of vehicles derived from sources outside of Maryland not subject to that State's legislation. Alexandria received 17,705 vehicles from non-Maryland sources in the first half of 1974, and 19,809 in the second half, for a net *gain* of 11.9%. If the flow of Maryland vehicles had followed the same general pattern, a similar 11.9% increase from 14,943 to 17,782 might have been projected. Instead, the Maryland total *dropped* from 14,943 to 10,066 vehicles for a net *decline* of 32.6% (and thus fell short of the projected figure by 7,716 vehicles).[52]

[50] The methodology employed in compiling and tabulating these statistics was explained, in thorough detail, by Alexandria's general manager. Gittelson affidavit ¶1, 5 (A. 74A-76A). The data is complete through December 31, 1974, and thus includes all statistics which were available on January 20, 1975, when the affidavit was filed (A. 2A).

[51] Table in Affidavit ¶5 (A. 75A). Alexandria processed 32,648 vehicles in the first half of the year and 29,875 in the second half, for a 1974 total of 62,523. Comparable totals for Maryland vehicles were 14,943, 10,066, and 25,009, respectively. Non-Maryland totals, derived by ordinary subtraction, were 17,705, 19,809, and 37,514, respectively.

[52] See n.51 *supra*.

3. Most of this decline was in connection with vehicles over eight years old and totally inoperable delivered from Maryland — the category which Section 11-1002.2(f)(5) exempts from title and notification requirements. Both before and after the statutory amendment, this category accounted for approximately 96% of all vehicles acquired from Maryland sources. Affidavit ¶8 (A. 78A). However, after July 1, 1974, the total *dropped* sharply, from 14,253 hulks in the first half of 1974 to 9,723 in the second half, for a net *decline* of 31.8% in the number of eight year old and inoperable hulks delivered from Maryland. Table in affidavit ¶8 (A. 78A).

4. The amended statute operated directly upon unlicensed suppliers, as distinguished from licensed wreckers which continued to use Certificates of Disposal (Form VR-28), a procedure not affected by the amendment. Affidavit ¶7 (A. 77A). Because licensed wreckers do not depend upon Section 11-1002.2(f)(5), their deliveries actually doubled from 1,934 vehicles in the first half of the year to 4,161 in the second half. Table in affidavit ¶7 (A. 77A).

Even so, this increased volume did not offset Alexandria's loss of Maryland trade with its unlicensed suppliers. Because they are not able to use Certificates of Disposal, unlicensed suppliers depend upon Section 11-1002.2(f)(5) for disposal of exempt hulks over eight years old and totally inoperable. They delivered 12,319 hulks to Alexandria during the first six months of 1974, accounting for 86.4% of its Maryland supplies. During the six months after the amendment took effect, the number *fell* to 5,562, for a net *decline* of 54.9%. Table in affidavit ¶7 (A. 77A). In other words, unlicensed suppliers delivered 6,757 fewer hulks from Maryland during the last six months of 1974 (at a time when licensed wreckers and non-Maryland sources were *increasing* their deliveries to Alexandria).

5. Because Alexandria could no longer receive bounties on the basis of indemnity agreements, its unlicensed suppliers apparently traded with Maryland processors which could. Alexandria received 11,249 exempt hulks pursuant to indemnity agreements in the first half of 1974, but the number *dropped* to 3,817 in the second half — a net *decline* of 7,432 hulks delivered under the indemnity agreement method. Table in affidavit ¶12 (A. 80A).

6. As of July 1, 1974, Alexandria and the other out-of-state processors could receive bounties only by producing a Certificate of Title, a Certificate of Disposal, a police Certificate of Authority, or an Auctioneer's Bill of Sale. Stipulation ¶15 (A. 60A). In order for scrap processors to produce such documents to the Administration, they must first receive such documents from those who supply the vehicles. Unlicensed suppliers are not authorized to use Certificates of Disposal and the other three "alternatives" are obtainable only in limited circumstances. After the 1974 amendment, those three "alternatives" did not increase the flow of hulks to Alexandria and certainly did not compensate it for the substantial loss of indemnity agreement trade:

	Jan-June 1974	*July-Dec. 1974*	*Net Change*
Police Certificates of Authority (VR-20) and Titles	173	179	+ 6
Auctioneer's Bill of Sale (Form VR-46)	1,197	589	—608
TOTALS:[53]	1,370	768	—602

In other words, the same unlicensed suppliers which cut their deliveries to Alexandria under indemnity agreements from 11,249 to 3,817, also saw fit to explore the

[53] Derived by simple addition from table in affidavit ¶12 (A. 80A).

"alternatives" with scrap processors which operate competing plants "physically located" in Maryland.

Alexandria's losses were not confined to bounty receipts. The substantial decline in its Maryland trade in automobile hulks diminished by many thousands of dollars the revenues which it derives from the sale of processed scrap metal to the steel industry. The situation was aggravated further by the irreplaceable loss of established, large-volume suppliers of Maryland hulks. For example, during the three months prior to July 1, 1974 (April, May, and June), Alexandria purchased *1,879* vehicles from an aggregate of eight unlicensed suppliers, who received a bounty-enhanced price for their hulks. The Administration paid $30,064 in bounties for the destruction of those hulks, most of which Alexandria rebated to the eight suppliers. During the next three months (July, August, and September), after the amendment took effect, the same eight suppliers delivered only *27* vehicles. Alexandria received $432 in bounties and rebated most of it to the suppliers. Affidavit ¶13 (A. 81A).[54]

Section 11-1002.2(f)(5), by its express terms, exempts abandoned hulks which are over eight years old and totally inoperable from police notification procedures. In theory, a vehicle supplier could ignore that exemption and initiate such notification procedures in order to obtain a police Certificate of Authority enabling him to

[54] One of those eight unlicensed suppliers, a Maryland-based firm (George Underwood), Harris affidavit ¶6 (A. 85A), delivered *691* bounty-eligible vehicles in interstate commerce from Maryland to Alexandria in May and June, 1974. After the 1974 amendment, that supplier delivered *none* to Alexandria, but instead dealt on an intrastate basis with Joseph Smith & Sons, Inc., a Maryland-based processor competing with Alexandria for automobile hulks originating in the Prince George's — Montgomery County area. Affidavit ¶14 (A. 81A).

dispose of such hulks, for bounty, to an out-of-state processor. Stipulation ¶15 (A. 60). In practice, however, such procedures were seldom, if ever, used in conjunction with that exempt class of hulks and never really considered an alternative to indemnity agreements prior to July 1, 1974, when the provisions of Section 11-1002.2(f)(5) were uniformly available to customers of *all* scrap processors, irrespective of location. Stipulation ¶16 (A. 60A).[55] Although the Administration has so stipulated, it suggested below that the situation has improved because the police in four Maryland counties "are able to complete" the notification procedures "within an average of approximately 72 hours from the filing of the application therefor". Harris affidavit ¶11 (A. 86A).

Unlike an indemnity agreement, however, the Certificate of Authority does not originate with scrap processors and the procedure for obtaining it lies wholly beyond their control. And that procedure is so cumbersome and time-consuming as to discourage its use by vehicle suppliers. In order to obtain a Certificate of Authority, a supplier must apply to a police department and furnish detailed information accompanied by an affidavit certifying to the truth of all material facts. Section 11-1002.2(f)(1-2) (A. 28A). If the police department is satisfied that the application is properly executed and sufficient in its contents, then the police must follow prescribed notification procedures, Section 11-1002.2(f)(3) (A. 28A), including but not limited to dispatching a letter by registered mail to all known owners and lienholders. Section 11-1002.2(a), (b) (A. 25A-26A). While it is entirely possible that the police

[55] Before July 1, 1974, police notification procedures were used rarely and mainly in conjunction with wrecked or abandoned cars which were less than eight years old. Affidavit ¶15 (A. 81A).

"are able to complete" those steps "within an average of approximately 72 hours", Harris affidavit ¶11 (A. 86A), the notice recipients have a statutory right to reclaim the vehicle within *three weeks* which must elapse before the vehicle supplier can obtain the Certificate authorizing its disposal. Section 11-1002.2(a), (f)(4) (A. 25A, 29A).

Section 11-1002.2(f)(5) expressly exempts hulks over eight years old and totally inoperable from these tedious procedures; the 1974 amendment did not affect that exemption. Because vehicle suppliers are *never* required to seek police authority to dispose of that class of hulks, it is unnecessary for them to obtain police certificates. Instead of wasting their time in a pointless exercise, these suppliers have continued to deliver old and inoperable hulks directly to licensed scrap processors, without police intervention or delay (72 hours or otherwise). Because a processor "whose plant is physically located and operating" in Maryland can execute an indemnity agreement which will trigger bounty payments, vehicle suppliers are not likely to deliver their hulks to any other processors.

In an attempt to counter the loss of its Maryland trade to Maryland-based competitiors, Alexandria did explore the use of police Certificates of Authority by its suppliers. After the amendment to Section 11-1002-.02(f)(5), Alexandria was advised by the Administration that suppliers could follow notification procedures to establish their claims to bounty rebates. Alexandria so notified its regular bounty customers, supplied them with forms, explained the necessary procedures, and solicited their continued business. The response was a mass exodus of Alexandria's regular suppliers, who proceeded to trade instead with Maryland scrap processors eligible to collect and distribute bounties by

filing indemnity agreements with the Administration. These suppliers simply went elsewhere so that they could continue to operate as they had in the past. Alexandria was unable to replace these established suppliers with new converts. After expressing interest in bounty rebates, and upon learning of the procedures necessary for obtaining them, these prospective suppliers pursued the subject no further. Affidavit ¶15 (A. 81A-82A). During the last six months of 1974, amid the collapse of its Maryland trade, Alexandria received fewer than 179 vehicles via police Certificates of Authority.[56]

E. The Proceedings Below.

On September 23, 1974, Alexandria brought this action in the United States District Court for the District of Maryland to challenge the validity of the amended version of Section 11-1002.2(f)(5). Its complaint (A. 3A-15A) alleged that the statute, on its face and as applied, burdened and discriminated against interstate commerce and denied equal protection of the laws. Jurisdiction was invoked under 28 U.S.C. §§1331, 1332, and 1343. Named as defendants (now Appellants) were Harry R. Hughes, as Secretary of the Maryland Department of Transportation, and other officials of the Administration charged with the operation and enforcement of the statutory program (A. 4A). Because Alexandria sought an injunction restraining the administration and enforcement of the Maryland statute by those officials, a three-judge court was requested (A. 13, R. 233) and designated pursuant to 28 U.S.C. §§2281 and 2284 (A. 2A, R. 239-41).

[56] In fact, this total includes vehicles documented by Certificates of Title, as well as police Certificates of Authority (VR-20). Table in affidavit ¶12 (A. 80A).

The defendant officials, represented by the Attorney General of Maryland, moved to dismiss the complaint on the ground that it did not raise a substantial federal question (R. 21). Alexandria countered with a motion for a preliminary injunction (A. 2A, R. 223). During the course of the proceedings, the District Judge to whom the case was initially assigned met with counsel and requested that the parties exert every possible effort, prior to hearing by the three-judge court, to reduce all material and relevant facts into stipulations and affidavits (A. 87A). Accordingly, the parties exchanged information and statistical data, following which they entered into a stipulation of facts (A. 57A-73A) accompanied by separate affidavits and exhibits (A. 73A-86A). In this regard, although the Administration already had statutory access to the records of all licensed scrap processors,[57] Alexandria twice invited the defendant officials to examine its records and satisfy themselves as to the accuracy of all information set forth in its affidavit (A. 88A-89A). The issues were thoroughly briefed (A. 94A). All parties understood, prior to hearing, that the case would be presented and argued solely on the facts contained in the stipulation and affidavits (A. 88A-91A).

On February 14, 1975, the case was heard by the designated three-judge panel, which explored with counsel the feasibility of reaching a final adjudication on the basis of stipulated and undisputed facts in the pleadings, stipulation, and affidavits, either by dismissing the action or by granting permanent injunctive relief (A. 92A-94A). In order to expedite the proceedings, all parties agreed to the court's suggestion that the case should proceed, then and there, to a final decision unless it appeared to the court that further evidentiary

[57] Section 5-206 (A. 22A-23A); M.A.R.R. §11.02.05.43 (A. 35A).

hearings were necessary and unavoidable (A. 95A-96A). The case was argued and submitted on that basis (A. 96A-118A).

On March 12, 1975, the court delivered a comprehensive opinion (AJS 1a-31a) and order (AJS 31a-32a), in which it declared Section 11-1002.2(f)(5), as amended, to be invalid under the Commerce Clause, as well as the Equal Protection Clause, and enjoined the defendant officials from restricting the application of that statute to scrap processors "whose plant is physically located and operating in this State", or from otherwise giving force and effect to those words in any manner. On April 25, 1975, the defendant officials noted this appeal from that order. (AJS 32a-33a).

SUMMARY OF ARGUMENT

I. *Commerce Clause.*

Section 11-1002.2(f)(5) is vitally important to commerce in unprocessed scrap metal because it operates directly upon abandoned hulks over eight years old and totally inoperable — the category which describes most of the hulks available for processing into forms acceptable to the steel industry. Maryland formerly encouraged this commerce, by exempting those hulks from police notification and title requirements and by paying bounties for their disposal by processing plants located in and near Maryland. Indeed, her representatives even now proclaim that "the scheme actually promotes commerce by artifically enhancing the value of abandoned vehicle hulks in excess of their natural market price." (Br. 9).

Under the amendment to that statute, however, Maryland has endeavored to subordinate the interstate part of that commerce by directing it to plants "physically located and operating" within her borders.

That amendment had the avowed purpose of protecting the small group of scrap processors located in Maryland which compete with licensed out-of-state processors for the purchase of scrapworthy hulks. In its practical operation the amendment achieves its discriminatory purpose, with the effect "of curtailing the volume of interstate commerce to aid local economic interests." *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 530 (1949). Although it does not expressly require all exempt hulks to be processed in Maryland, *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142-43 (1970), its necessary tendency is to make it economically disadvantageous for sellers of hulks to export them for processing because of the artificial price differential established by the bounty program. *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Haiilburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *H. P. Hood & Sons, Inc v. DuMond,* 336 U.S. 525 (1949); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). In order to compete on equal terms with the protected local interests, Alexandria and other licensed out-of-state processors would be required to relocate their plants to Maryland — a requirement which this Court had declared "to be virtually *per se* illegal". *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 146 (1970); *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963); *Toomer v. Witsell,* 334 U.S. 385 (1948). The 1974 amendment is an implicit invitation "to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the Nation." *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935); *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 538-39 (1949).

Maryland provides no avenues of escape from the practical effect of its discriminatory amendment.

Because the statute thus amended exempts the hulks from police notification procedures, it is inherently improbable that sellers of hulks will utilize such unnecessary procedures merely to promote the rehabilitation of interstate commerce. By relegating interstate commerce to unprofitable and seldom-used routes, while local business continues to travel the main "avenue", the amendment is indefensible. *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 539-40 (1949). Nor is it justified by any legitimate local interest which could not be as readily secured by reasonable nondiscriminatory alternatives. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 143 (1970); *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951).

II. *Equal Protection Clause.*

A licensed out-of-state scrap processor which has established a Maryland office, opened its facilities and records for inspection by Maryland officials and dealt directly with the Motor Vehicle Administration in Maryland's program for the disposal of abandoned vehicle hulks has thereby established contacts which are sufficient to bring it within Maryland's jurisdiction, insofar as its Maryland-licensed activities are concerned. Assertions that Alexandria is not "within the jurisdiction of the state", or entitled to protections secured by the Equal Protection Clause, are without substance. Alexandria is entitled to have its constitutional rights upheld. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison,* 301 U.S. 459, 462 (1937).

At a minimum, this Court requires that a statutory classification bear some rational relationship to a legitimate state purpose. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972). The classification scheme which precludes Alexandria from use of the

expeditious indemnity agreement procedure serves no rational interest related in any way to genuine or legitimate differences between in-state and out-of-state scrap processors or to the purpose behind the Maryland legislation. Four propositions are advanced in support of the statutory discrimination, but Appellants do not (and in fact cannot) relate them in any rational manner to the purposes of the legislative program. Analysis of these purported interests demonstrates clearly that the overriding purpose of the amendment was the exclusion of out-of-state licensed scrap processors (who are otherwise identically situated) from the major portion of the Maryland abandoned vehicle market solely because of their foreign location. *WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117 (1968). This court cannot uphold discriminations "supported by mere fanciful conjecture", *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, supra,* 301 U.S. at 462, and "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975). This is not a situation of an out-of-state business seeking protection from the hazards of competition within; rather, Maryland is seeking to protect its local businesses from the hazards of competition from without. The discriminatory legislation has, by purposeful and invidious classification, effectively excluded Alexandria from engaging in competition with scrap processors who, except for location, are identically situated in all respects.

III. *The District Court Proceedings.*

Appellants were fully accorded due process in compliance with Rule 56, Federal Rules of Civil

Procedure. Alexandria demonstrated that it was entitled to judgment as a matter of law because the 1974 amendment discriminated unfairly and substantially burdened interstate commerce, without any legitimate rational justification, in violation of the Equal Protection and Commerce Clauses of the Constitution. The absence of a genuine issue as to any material fact is established by stipulation and uncontroverted affidavit. The drastic adverse economic impact of the discriminatory 1974 amendment upon Alexandria and similarly situated non-Maryland scrap processors was fully documented, as was the substantial burden of the amendment on interstate commerce in abandoned vehicle hulks.

Appellants impugn the summary judgment entered below by alleging the existence of factual disputes which had no bearing on the outcome. Their conclusions are misplaced because the contested facts, few in number and minor in their significance, were immaterial to constitutional adjudication. The existence of indemnity agreements specifying the District of Columbia as the origin of certain Maryland-titled abandoned cars is inconsequential in view of the undisputed fact that no statute nor any regulation or practice pursuant thereto disqualifies Maryland-titled cars abandoned outside Maryland from bounty payments. The two instances of mismatch between car and Vehicle Identification Number plate cited by Appellants are equally immaterial to the documented and uncontradicted fact that Alexandria was dramatically damaged by the 1974 amendment. Appellants' unsubstantiated charge that the 1974 amendments might not have substantially burdened interstate commerce is wrong as a matter of fact, logic, and law. Having established that the 1974 amendment was inherently unconstitutional, as con-

firmed by uncontroverted facts of record, the District Court properly enjoined the enforcement of the Statute and correctly entered summary judgment for Alexandria.

ARGUMENT

I. IT IS REPUGNANT TO THE COMMERCE CLAUSE FOR A STATE, IN REGULATING THE DISPOSITION OF VEHICULAR SCRAP METAL, TO PAY BOUNTIES CREATING AN ARTIFICIALLY ENHANCED VALUE FOR SCRAP PROCESSED IN PLANTS "PHYSICALLY LOCATED AND OPERATING" IN THAT STATE, FOR THE PURPOSE OF PROTECTING ITS DOMESTIC PLANTS AGAINST COMPETITION AND WITH THE PRACTICAL EFFECT OF WITHDRAWING FROM INTERSTATE COMMERCE MOST OF THE SCRAP WHICH WAS FORMERLY EXPORTED FOR PROCESSING.

This appeal is from a decision by a court of three federal judges, each drawn from Maryland practice and acquainted with the legislative processes in Annapolis. Those judges evaluated the 1974 amendment to Section 11-1002.2(f)(5), in its legislative context and in the light of this Court's historic interpretations of the Commerce Clause. Their decision was unanimous. By its terms, and in its practical operation (AJS 29a), the 1974 amendment was denounced as being repugnant to the Commerce Clause. The essence of the decision may be captured in one of its sentences (AJS 28a):

> The effect of that amendment is substantially to burden the flow of interstate commerce by promoting the economic advantages of scrap processors with plants in Maryland, who alone, pursuant to that amendment, may receive bounties on inoperable vehicles in excess of eight years of age without any requirement that their suppliers have complied with procedures inevitably consumptive of more time and energy than the filing of an indemnity agreement, and who, as contrasted with processors with only out-of-state plants, are statutorily accorded the immunization against suits by owners or alleged owners of the vehicles to the extent provided by such agreements.

Every word in that statement is documented by the record. Every word save one, "substantially", is unchallenged on this appeal. Rather than confront the holding, Appellants skirt it with a succession of unwarranted generalities and truisms which, if anything, describe the so-called bounty program *before* it was amended. Because they do not address the amendment's purposeful and unconcealed discrimination against scrap exported for processing, it is their unedifying conclusion that the Commerce Clause "is not disturbed by a statutory scheme which promotes commerce among the States." (Br. 24).

Appellants inform this Court that "Alexandria's complaint is really that its bounty receipts have not increased by as much as it would have liked". (Br. 23). Alexandria, they say, is aggrieved because "the 1974 legislation caused is [sic] primary source of bounty revenue to evaporate" (Br. 7) and "that the amended bounty scheme imposed a burden upon its ability to collect bounties". (Br. 8). Appellants maintain that, "until mid-1974, Alexandria had been riding the Maryland gravy train" (Br. 16-17) but that the ride ended when "the Legislature restricted the means by which non-Marylanders could take advantage of Maryland's generosity" and "Maryland's munificence" (Br. 17). There are repeated assertions (Br. 11, 17, 22, 28, 31) that no scrap processor "has a constitutional right to receive price-supportive bounty payments for scrapped motor vehicles." (Br. 17).[58]

[58] Appellants seem to liken Alexandria to the smiling young lady from Niger. See *Corporation Commission of Oklahoma v. Federal Power Commission*, 415 U.S. 961 (1974) (dissenting opinion).

These epigrams do little to promote analysis of the issues actually litigated and resolved below, much less fairly describe the so-called bounty program in its amended context or its practical operation upon trade in scrap metal. Appellants no longer view the bounty as a means to a legitimate end. Rather, they now proclaim the bounty to be an end in itself, justifying any artificial economic barrier to interstate commerce or discrimination against outside competition. But the right which won enforcement in the District Court is not measured by Maryland's "generosity" or "munificence". The right to purchase scrapworthy hulks from Maryland sellers, with or without bounties, is fundamental. What was said of wheat in *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 (1925), and cotton in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 31 (1974), is equally true of vehicular scrap metal:

> [I]t is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the Commerce Clause of the Constitution.

A. Section 11-1002.2(f)(5), as Amended, Discriminates Against Interstate Commerce in Vehicular Scrap Metal With the Practical Effect of Creating Artificial Economic Barriers to Its Export for Processing.

It is undeniable that raw scrap metal, in the form of automobile hulks, is a recognized commodity of trade. Although the abandonment of hulks creates a local problem, and their removal is a local solution, the disposal of the hulks is the first stage in the "scrap

cycle". Automobile hulks, in their unprocessed state, are not marketable directly to the steel industry. Scrap processors play an indispensable role in the "scrap cycle" by converting the hulks into forms of processed scrap acceptable to the mills. And the "scrap cycle" is but a euphemism for commerce in scrap metal.[59]

In order to discharge this function, scrap processors must acquire hulks by the thousands from willing sellers, wherever located. Like all manufacturing enterprises, scrap processors establish commercial relations without regard to state lines. They depend upon a regional network of regular suppliers to satisfy their endless demands for raw scrap. There "is relatively fierce competition by scrap processors for the acquisition of the available hulks". Stipulation ¶11 (A. 59).

By comprehensive legislation, enacted as an environmental measure under its reserved police powers,[60]

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[59] "* * * [T]he most effective and most practical means [of restoring the scrap cycle] would seem to be to use the scrapping process, which combines profit for industry with conservation of natural resources. From the evidence presented to the Committee, the objective would seem to be to accelerate the movement of the vehicle from the owner who has decided to discard it, to the auto wrecker who salvages parts 'and markets the hulk, to the scrap processor who reduces it to scrap marketable at the mills, and finally to the steel mills which convert it into new usable steel." Maryland Legislative Council Committee on Taxation and Fiscal Matters, 1967 Report 60 (A. 40A-41A). Appellants' Br. 12-13. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 26 (1974).

[60] *Administrator v. Vogt*, 267 Md. 660, 675, 299 A.2d 1, 9 (1973). In the District Court, Appellants advanced a theory that the legislation was not subject to limitations imposed either by the Commerce or Equal Protection Clauses. Citing *Field v. Barbee Asphalt Paving Co.*, 194 U.S. 618 (1904), and *Atkins v. Kansas*, 191 U.S. 207 (1903), among other authorities, they asserted that Maryland was acting in a business or "proprietary" capacity in arranging for the

Maryland has exerted a large measure of control over the transfer and disposition of scrapworthy hulks abandoned within its boundaries. It prescribes the conditions under which the hulks may be delivered for scrapping. It requires the licensing of scrap processors to whom the hulks may be disposed. It treats any statutory violation as a misdemeanor and as cause for license revocation. Finally, as an integral part of the scheme, Maryland pays a bounty for each hulk destroyed by a licensed processor, upon presentation of the title or its equivalent and satisfactory proof of destruction.

Because Section 5-205 authorizes bounty payments to licensed scrap processors, Appellants insinuate that those processors have "realized a most welcome source of revenues" flowing from "Maryland's generosity" and "munificence" (Br. 16, 17). In fact, bounties are distributed primarily to those who sell the hulks to processors. As a matter of practice, which has Maryland encouraged (and which competition necessitates), most of the bounties are rebated to Maryland suppliers as incentives for future deliveries; this division of the bounty promotes the legislative purpose of inducing them to move their hulks into the "scrap cycle". Stipulation ¶12 (A. 59A-60A).

Maryland is part of a nationwide scrap market, but is the only State with a bounty program or similar arrangement (Br. 17). This program puts Maryland in a unique economic position to direct the flow of hulks

disposal of scrap metal and in paying bounties to private enterprises in furtherance of the legislative goals. That issue was thoroughly briefed and argued below. The District Court rejected Appellants' contentions for reasons stated in its opinion (AJS 15a-17a, 27a-28a). Appellants have not resurrected that issue on appeal, either in their jurisdictional statement or their brief on the merits. Because that issue has been abandoned, we do not address it further.

within its borders. On one hand, the market price of hulks is subject to wide and erratic fluctuations, depending upon the cyclical state of the steel industry. Thus the prevailing price "is influenced by national and international economic conditions over which Maryland has no control." Stipulation ¶11 (A. 59A). On the other hand, the bounty program inflates Maryland scrap prices by artificially enhancing the value of hulks in excess of the prevailing market price. The bounty is *not* a price support or stabilizer. It is an amount fixed by statute and is payable whether the market price rises or falls. It is a fixed price *supplement*, enabling all sellers of Maryland hulks to command higher prices at all times, good or bad, than would be obtainable in the free marketplace — provided that they sell only to licensed scrap processors under procedures which trigger payment of the bounty.

The bounty gives this commerce its direction, by pointing it to those scrap processors which Maryland has franchised by license. Section 11-1002.2(f)(5) expedites the flow of that commerce by exempting most hulks from two requirements (title certificates and police notification procedures) which would otherwise retard or obstruct the free movement to processing plants. Operating in direct conjunction with the bounty program, Section 11-1002.2(f)(5) enables the largest class of vehicle sellers (including towing services and everyone else) to deliver the most scrapworthy variety of hulks (abandoned vehicles over eight years old and totally inoperable) to licensed scrap processors, immediately and without title certificates or police notification procedures.

The legislation operates directly upon commerce in automobile hulks and controls their disposition for scrap processing. Appellants concede this, proclaiming at

every turn[61] that "the scheme actually promotes commerce by artificially enhancing the value of abandoned vehicle hulks in excess of their natural market price." (Br. 9). Prior to the 1974 amendment, Maryland did not attempt to retain this commerce within its borders. It issued licenses to scrap processors operating plants in contiguous states, presumably in recognition of the interstate dimensions of the commerce which it sought to promote. Most of the hulks exported from Maryland for processing were in the exempt category and thus commanded the same artifically-enhanced value as those delivered to domestic processors. The local supply of that commodity remained an object of competition by scrap processors, giving Maryland vehicle suppliers a regional choice of outlets able to pay bounty-enhanced prices.

By its terms and necessary operation, however, the 1974 amendment to Section 11-1002.2(f)(5) eliminated this freedom of choice. It preserved the exemption from title and notification requirements, but abolished the bounty for hulks delivered to processing plants outside Maryland. In contrast to the broad legislative aims of the original program, the 1974 amendment was enacted for the avowed "purpose of protecting *certain* scrap

[61] E.g., "the Maryland bounty program creates an artificial value for automobile hulks which encourages their expeditious delivery to scrap processors." Br. 15. "The bounty program actually *promotes* interstate commerce * * *." Br. 18. (Italics in original). "* * * Maryland is trying to put as much scrap into the stream of 21. "In fact, the Maryland scheme furthers interstate commerce * * * one of the aims of the legislation". Br. 21. "Indeed, it is Appellants' contention that the Maryland bounty program is a boon to interstate commerce * * *. The program, since its institution, has unquestionably led to more scrap metal being placed in the flow of commerce then [sic] was the case before its enactment." (Br. 38).

processors who destroy certain motor vehicles by authorizing *them* to file an indemnity agreement" (A. 15A) which would be "acceptable for payment of the full bounty authorized by Section 5-205" (A. 16A). The statute, as amended, carefully identified on its face those whom it was "protecting" — i.e., each and every "scrap processor whose plant is physically located and operating in this State". Since only nine scrap processors met this definitive criteria, a fact well recognized before the Maryland Legislature acted, *Administrator v. Vogt,* 267 Md. 660, 675, 299 A.2d 1, 9 n.3 (1973), and because only five Maryland processors had ever participated in the program to any significant degree, stipulated table VI (A. 72A), the protected beneficiaries were virtually hand-picked. And their monopoly on exempt hulks was assured because, unless they destroyed the hulks, "the [bounty] provisions of Section 5-205 shall not apply." (A. 16A).[62]

Nor can it be assumed that the discrimination thus practiced was an accident of statutory draftsmanship. It can hardly be supposed that the Legislature was unaware of the interstate attributes of the "scrap cycle", as described by its own committee reports, or of the fact that the plants of seven of the 16 licensed processors are located in Virginia or Pennsylvania. Otherwise, the amendment would have been a mindless exercise altogether. Its purpose was transparently clear: to protect a handful of scrap processors with plants "physically located and operating" in Maryland against outside competition.

[62] There seems to be little or no disagreement on this point. "When the Maryland Legislature amended the law in 1974, only scrap processors with plants physically located and operating in Maryland were permitted to obtain inoperable eight year old vehicles, upon which bounties would be paid, if an indemnity agreement was executed in favor of the scrapper." Appellants' Br. 15.

By removing non-Maryland scrap processors from the bounty program, the amendment did not merely divest them of statutory rights or privileges enjoyed continuously since the program's inception. More than that, it denied them competitive access to Maryland's primary source of raw scrap metal. Within its borders, hulks in the exempt class retained their "artificially enhanced value" because Maryland continued to pay bounties for their destruction by domestic processors. The same hulks, if exported from Maryland for processing, however, were stripped of that added value and only commanded the lower prices prevailing in the free market for scrap. In the scrap metal business, as in any other, sellers go where prices are highest. Maryland continued to generate artificially-enhanced prices through bounty payments, but now required its sellers to trade with domestic scrap processors in order to obtain them. These sellers were not prohibited by the express terms of the law from delivering their hulks in interstate commerce to outside scrap processors. They were prohibited by the law of practical economics, which visits a financial sacrifice upon all who disobey.

Appellants insist that Maryland may manipulate bounty payments as it sees fit because no scrap processor is entitled to receive them as a matter of constitutional right (Br. 11, 17, 22, 28, 31). "At best", they say, "Alexandria is only *entitled* to reap whatever benefit it can derive from the free marketplace." (Br. 22) (italics in original). The right to compete in a free marketplace, with its attendant benefits and risks, is precisely what this case is all about.[63] If Maryland may

[63] The contemporary health of the marketplace, when Maryland amended its program, is described in Wellemeyer, "For Scrapmen, These Are Tinsel Days", FORTUNE 150 (Aug. 1974), *infra* at 107.

withdraw from "the free marketplace", and create an artificially enhanced market of its own for the sole enjoyment of domestic scrap processors, then we have truly returned to the reign of the Articles of Confederation. However, "[t]he Commerce Clause created the nationwide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states." *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389, 395 (1952). And that Clause makes it a "certainty" that Alexandria "will have free access to every market in the Nation", including Maryland's. *Allenberg Cotton Co. v. Pittman,* 419 U.S. 20, 32 (1974); *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 539 (1949). As one of the 13 original signatories to the Constitution, Maryland may not detach herself from "the free marketplace". "This principle that our economic unit is the Nation * * * has as its corollary that the states are not separable economic units." *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 537-538 (1949).

In fact, Maryland disavows any attempt to retain for itself the available local supply of automobile hulks. See *Toomer v. Witsell,* 334 U.S. 385, 404-06 (1948); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 13 (1928). Indeed, its policy is to rid itself of these hulks by getting them into the "scrap cycle". By licensing scrap processors on either side of her borders, and by paying bounties for hulks removed to processing plants for destruction, Maryland formerly encouraged and sanctioned this commerce. *Toomer v. Witsell,* 334 U.S. 385, 405 (1948); *Pennsylvania v. West Virginia,* 262 U.S. 553, 597 (1923). Even now, her representatives maintain that "the Maryland scheme furthers interstate commerce" and that "Maryland is trying to put as much scrap into the stream of interstate commerce as her limited resources will allow." (Br. 21).

Under the amendment, however, Maryland released only *processed* scrap into the stream of interstate commerce, in direct competition with scrap processed elsewhere. By making *unprocessed* scrap exports unprofitable, it fastened its grip on the *hulks* and stimulated their movement to processing plants "physically located and operating in this State". Maryland did not conserve "her limited resources", but reallocated them to subsidize the domestic processing of scrap. Bounties were paid at an undiminished rate because most of the hulks were processed within its borders. Local scrap processing would thrive commercially under such a preferential scheme, if not enjoined, "but to the same extent the commerce of the Nation would suffer discrimination." *Best & Co. v. Maxwell,* 311 U.S. 454, 457 (1940).

Maryland clearly may not preempt the local supply of automobile hulks or accord to its scrap processors a preferred right of purchase over outsiders. This Court has "held that when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it." *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 535 (1949).[64]

The District Court held that the 1974 amendment imposed a substantial and unjustified burden on

[64] "Much of the business is interstate and has grown up through a course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do." *Pennsylvania v. West Virginia,* 262 U.S. 553, 597-98 (1923). See *Toomer v. Witsell,* 334 U.S. 385, 403-404 (1948); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 13 (1928).

interstate commerce by promoting the economic advantages of scrap processors with plants in Maryland and that its practical effect was "rather predictable and almost inevitable". AJS 28a, 29a. This appeal seeks to revive Maryland's "eleventh-hour, in-the-halls handwritten amendment" (A. 97A) on the ground that it "(affects interstate commerce only incidentally and remotely), *Shafer v. Farmers Grain Co.,* 268 U.S. 189, 199 (1925)." (Appellants' Br. 23). Appellants fault the District Court's analysis of the Commerce Clause as "simply upsidedown" (Br. 18), and, on the basis of their own capsulated summaries of this Court's precedents (Br. 18-21), advance a singular hypothesis: "State statutes which have been held unconstitutional as violative of the Commerce Clause have all had one feature in common: they have *prohibited* some form or facet of interstate commerce, either by precluding such commerce outright, or by placing such a heavy burden upon some aspect of commerce that, in effect, it could not be conducted." (Br. 18; italics in original).

We submit that the decisions cited by Appellants,[65] as well as the ones which they overlook,[66] refute their

[65] *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525 (1949); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Shafer v. Farmers' Grain Co.,* 268 U.S. 189 (1925); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923).

[66] See e.g., *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963); *West Point Wholesale Grocery Co. v. City of Opelika,* 354 U.S. 390 (1957); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Nippert v. City of Richmond,* 327 U.S. 466 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940); *Hale v. Bimco Trading Co.,* 306 U.S. 375 (1939); *Lemke v. Farmers' Grain Co.,* 258 U.S. 50 (1922).

central thesis that interstate commerce may be retarded or hindered if it is not brought to a complete standstill. Occasionally, of course, this Court has encountered measures which, if enforced, would have prevented trade from being conducted. However, it has also dealt with laws attempting to protect local industry from out-of-state competition by subjecting exports or imports to economic disadvantages. These laws too have fallen under the Commerce Clause, not because they prevented interstate trade, but because they discriminated against it.

The amendment to Section 11-1002.2(f)(5) is discriminatory on its face. It was enacted for the declared "purpose of protecting certain scrap processors" whose plants are "physically located and operating in this State". Its major object was to confer upon them clearly-stated economic advantages in the purchase of scrap — advantages which are expressly denied to their licensed competitors whose plants are located in contiguous states. Because Section 11-1002.2(f)(5) operates directly upon the category of hulks which forms the bulk of trade in scrap metal, the argument (based on *Shafer*) that it "affects interstate commerce only incidentally or remotely" is answered by *Shafer* itself:

> Only by disregarding the nature of this business and neglecting important features of the act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded.

Shafer v. Farmers' Grain Co., 268 U.S. 189, 200 (1925).

Maryland has proclaimed in its amendment that "only a scrap processor whose plant is physically located and operating in this State" shall be protected in competing for this category of hulks. By the very

terms of that instrument, Maryland has preempted the most lucrative segment of its raw scrap market for its domestic processors. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377 (1964). This is a prohibition or exclusion on its face. The "incidental" or "indirect" burden argument loses all force "where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

> Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935). See *Hale v. Bimco Trading Co.*, 306 U.S. 375, 380-81 (1939) (declared purpose of protecting domestic cement industry from "unfair competition" held to be "a rather candid admission that the very purpose of the statute is to keep out foreign goods"). *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 374 (1964); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 530-31 (1949).

Even if the Maryland Legislature had concealed its discriminatory purpose, its amendment of Section 11-1002.2(f)(5) would be no less vulnerable under the Commerce Clause. The test is "whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce". *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940). See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891).

> The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, *the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.*

Best & Co. v. Maxwell, supra at 457 (italics added).[67]

Maryland's statutory payment of bounties for all scrap which is processed in local plants, while denying payment for scrap exported for processing, may be a novel form of discrimination. Relatively few cases have arisen involving schematic methods of withholding raw materials from export in order to stimulate local manufacturing or processing of those materials. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Shafer v. Farmers' Grain Co.*, 268 U.S. 189 (1925); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922).[68] Maryland's bounty system, being unique, is without precedent in this Court. But the discriminatory aspect, introduced by the amendment to Section 11-1002.2(f)(5), is not immunized by its novelty. "The Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

[67] "Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the State of its internal police power, *though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception.* * * * Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (italics added). See *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 374 (1964); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532 (1949).

What is controlling here is not the means by which Maryland has chosen to discriminate, but the practical effect of that discrimination upon interstate commerce. The amendment does not expressly require all exempt hulks to be processed in the State, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142-43 (1970), but the artifically enhanced price differential which the amendment does establish is calculated to achieve that result. As the District Court noted, that amendment constitutes the means to an end which "is rather predictable and almost inevitable". AJS 29a. Alexandria's experience confirms that actuality.

It is the economic realities of the situation which are dispositive since "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions". *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963). Although the amendment to Section 11-1002.2(f)(5) provides ostensible loopholes for unprofitable interstate commerce, it has "removed any *economic* incentive" to engage in such commerce. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 376 (1964). "In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consum-

[68] "As most states serve their own interests best by sending their produce to market, the cases in which this Court has been obliged to deal with prohibitions or limitations by states upon exports of articles of commerce are not numerous." *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

ers" of raw scrap. *Pennsylvania v. West Virginia*, 262 U.S. 553, 597-98 (1923). It imposes "*economic* restraints on interstate commerce for local *economic* advantage", *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949), and "would neutralize the *economic* consequences of free trade among the states". *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526 (1935). "While the inequality in question may have been an accident of statutory drafting, it does in fact strike at a significant segment of *economic activity* and carries *economic effects* of a type proscribed by many previous cases." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (all italics added).

The artful schemes which have been devised to place interstate commerce at a competitive disadvantages are infinite in their variety. The authors of such schemes, while advancing good and sufficient reasons for promoting them, have invariably denied any purpose to place interstate commerce at a disadvantage. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state," *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949), as well as attempts "to impose an artificial rigidity on the economic pattern of the industry." *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948). While the states may employ a variety of means to attain legitimate safety and welfare goals, the Commerce Clause imposes well-recognized disabilities. States may not adopt schemes for the avowed purpose or with the practical effect "of curtailing the volume of interstate commerce to aid local economic interest",[69] or "erecting an economic barrier protecting a major

[69] *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 530-31 (1949).

local industry against competition from without",[70] or discriminating against interstate commerce[71] "by providing a direct commercial advantage to local business",[72] or engaging in "discrimination in favor of intrastate businesses",[73] or extending preferential treatment and special exemptions thereto,[74] or attempting to reserve a substantial share of the local market for local businesses,[75] or protecting local industry from out-of-state competition,[76] or attempting to place domestic

[70] *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). See *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535, 538 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 527 (1935).

[71] *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963); *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, 392 (1957); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 395 (1952); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Best & Co. v. Maxwell*, 311 U.S. 454, 496 (1940); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923); *Bethlehem Motor Corp. v. Flynt*, 256 U.S. 421, 427 (1921); *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891).

[72] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

[73] *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940). See, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 392 (1952).

[74] *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 74 (1963); *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, 392 (1957).

[75] *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 375-77 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949); *Pennsylvania v. West Virginia*, 262 U.S. 553, 598 (1923).

[76] *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377, 379 (1964); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 531, 538 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

markets in a position of "economic isolation",[77] or creating a preferential trade area,[78] or requiring that certain kinds of processing be done in the home state before shipment out of it,[79] or insuring that local demands are satisfied before a commodity may be bought or sold in interstate commerce,[80] or manipulating prices or profit margins "to suppress or mitigate the consequences of competition",[81] or granting to local industry "a preferred right of purchase" over outside buyers.[82]

Maryland has arrogated to itself the power of creating an artificial, anti-competitive price differential between scrap retained within its borders and scrap moving in interstate commerce to non-Maryland processors. "Such a power, if exerted, will set a barrier

[77] *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). See *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949).

[78] *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951). See, *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377 (1964); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963).

[79] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 147 (1970); *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928).

[80] *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). See *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 536 (1949); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10-11 (1928).

[81] *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). See *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 379 (1964); *Lemke v. Farmers' Grain Co.*, 258 U.S., 59 (1922).

[82] *Pennsylvania v. West Virginia*, 262 U.S. 553, 595 (1923). See *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535-36 (1949).

to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported". *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 373 (1964); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532 (1949); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 59 (1922) (striking down "a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce"). By engendering artificial price differentials, the amendment to Section 11-1002.2(f)(5) can only diminish the flow of unprocessed scrap from Maryland to out-of-state processors. "Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the [scrap] heretofore and now going to consumers in the [neighboring] states, and therefore will work a serious interference with that commerce". *Pennsylvania v. West Virginia*, 262 U.S. 553, 597 (1923) (bracked words added).

This form of price manipulation is all the more reprehensible because it exalts the mere fact of instate location over all other considerations. The benefits of Section 11-1002.2(f)(5), as amended, are reserved for those "whose plant is physically located and operating in this State". In order to share these benefits, on equal terms, it would be necessary for scrap processors to establish a plant on Maryland soil, together with "their extraordinarily expensive equipment which the statute requires them to maintain",[83] and begin "operating" there. Apart from the manifest burdens of forced relocation, it is difficult to perceive how relocation

[83] *Administrator v. Vogt*, 267 Md. 660, 675, 299 A.2d 1, 9 (1973).

across the Potomac River would either improve the efficiency of Alexandria's business or enhance Maryland's ability to promote the welfare, safety, and environmental health of its citizens.

By its focus upon in-state plant location, the 1974 amendment is offensive to the Commerce Clause precisely because it is an incentive to locate within Maryland and build expensive new facilities there in order to avoid or mitigate the consequences of discrimination. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963). Legislation which in its practical operation requires that certain kinds of processing be performed in the home state before shipment in interstate commerce has been consistently invalidated under the Commerce Clause. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142-43 (1970); *Toomer v. Witsell,* 334 U.S. 385, 403-04 (1948); *Best & Co. v. Maxwell,* 311 U.S. 454, 456 (1940); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928). Discrimination in favor of local industry necessarily "encourages an out-of-state operator to become a resident in order to compete on equal terms". *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963).

In *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), this Court proclaimed an end to parochial nonsense of the sort exemplified by the amendment to Section 11-1002.2(f)(5):

> The nature of that [relocation] burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. *Even where the state is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.*

Id, 146 (Italics added).

When a state attempts to promote the economic welfare of industry located within its borders, by guarding it against nonresident competition, "the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the Nation". *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935). See *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 374 (1964). If Maryland can control scrap within its borders by a bounty which artificially enhances the value of the hulks, what is to prevent Virginia from retaliating with a bounty of its own which would deny Maryland scrap processors access to Virginia sources of scrap metal.[84] Or what about Pennsylvania, with its powerful complex of steel mills? In retaliation for Maryland's treatment of the six Pennsylvania licensees, the Commonwealth of Pennsylvania might find it expedient to pay subsidies to those steel mills which consume only Pennsylvania-processed scrap until the supply has been exhausted, thereby depriving Maryland scrap processors of a convenient and indispensible market for their products.

The potential for interstate mischief would be infinite, unless the Commerce Clause is effective to prevent it.

> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the

[84] Indeed, Appellants *invite* such retaliation: "If Alexandria believes that price-supportive bounty payments are essential to its survival, its proper redress is * * * with the legislature * * * sitting in Richmond, Virginia, and not that body which deliberates in Annapolis, Maryland. * * * Surely the Commonwealth of Virginia is in a position to establish its own bounty program if it so desires and * * * provide the relief which Alexandria would have." (Br. 32-33). Appellants seem to forget that it is Congress, and not the State legislatures, which may regulate interstate commerce.

history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. *We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority.* What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! *Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met?* Would she not have every argument in favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 538-39 (1949) (italics added).

B. THE EXISTENCE OF LIMITED ALTERNATIVE METHODS FOR DISPOSAL OF VEHICULAR SCRAP METAL DOES NOT MITIGATE THE DISCRIMINATORY EFFECTS OF THE AMENDMENT TO SECTION 11-1002.2(f)(5).

Appellants contend that the situation is not so bleak for non-Maryland scrap processors, notwithstanding the manifest discrimination practiced against them by Section 11-1002.2(f)(5), as amended. The thrust of their position is that Maryland has only restricted the *means* by which those scrap processors may obtain bounty payments. Other methods are said to be open to them which, if utilized, would assure unlimited competition with domestic scrap processors. (Br. 16, 17, 23, 28, 31).

These revelations, if true, merit attention. In order to facilitate consideration of Appellants' position, we set forth *verbatim* the entire catalogue of their assertions:

> * * * The program allows Alexandria, or any licensed non-Maryland scrap processor, *unlimited* participation in the bounty program. * * * (Br. 9; italics added).
>
> Of course, non-Maryland scrappers may still receive bounties for these vehicles as long as they are documented *in some permissible fashion other than by indemnity agreement.* (Br. 15 n.24; italics added).
>
> * * * Under the Maryland bounty program, non-Maryland scrappers, including Alexandria, may not obtain bounties by the execution of indemnity agreements, *although all other methods are available to them.* * * * (Br. 16; italics added).
>
> * * * In 1974 the Legislature *restricted the means* by which non-Marylanders could take advantage of Maryland's generosity. * * * (Br. 17; italics added).
>
> * * * [T]he Legislature has not limited the extent of Alexandria's participation in the program, *but only the means by which it may partake of the benefits.* * * * (Br. 31; italics added).
>
> * * * It should not be overlooked that, even today, Alexandria can participate in Maryland's program to an *unlimited* extent, *as long as it follows the avenues open to non-Maryland scrappers.* * * * (Br. 23; italics added).
>
> * * * [T]he effect of the Maryland law as amended is *merely to limit the means* by which scrap processors who do not operate plants located in Maryland may obtain hulks eligible for bounty payments. *Only the indemnity agreement avenue is closed to non-Maryland scrappers. Other methods of acquisition remain available for use by all scrappers.* * * * (Br. 28; italics added).

> Alexandria not only asserts that it has a right to participate in Maryland's program, *but also claims that it can do so on its own terms.* In fact, it is the State of Maryland which is distributing the benefits involved, and which has broad latitude to determine the extent, and the recipients, of the bounties, *as well as the means by which the payments will be made.* (Br. 28; italics added).

Of course, most of this is sheer rhetoric, devoid of substance, unsupported by the record, and plainly contradicted by the very statutes which Appellants administer. It is noteworthy that these adroitly-contrived assertions fail to describe the "means", "methods" or "avenues" open to non-Maryland scrap processors in order to assure their "unlimited" participation in the bounty program. Not one statutory citation shores up these propositions, which the District Court exposed as fallacious. AJS 28a-30a. We have also treated the subject, *supra* at pp. 19-22, 37-41.

The unspoken premise is that non-Maryland scrap processors may still obtain payment of bounties by presenting title certificates or police certificates of authority for the vehicles destroyed. That much is true, but the difficulty lies in the fact that these documents are unobtainable by scrap processors, except to the extent that they are provided by those who deliver the hulks for scrapping. If a hulk is accompanied by a title or police certificate, the scrap processor may buy it. If not, however, the scrap processor must reject the hulk — unless it is an abandoned vehicle over eight years old, without engine, or otherwise totally inoperable. Section 11-1002.2(f)(5) exempts those hulks from title and police certificate requirements and permits their immediate transfer for processing. It is that statute which embraces the overwhelming volume of trade in automobile hulks (96% of the Maryland hulks acquired

by Alexandria are over eight years old and totally inoperable). It is that statute which is now closed to out-of-state processors, insofar as the bounty program is concerned.

In other words, Maryland vehicle suppliers of exempt hulks described by Section 11-1002.2(f)(5) are afforded three choices under the amendment: (1) They may deliver such a hulk to a Maryland scrap processor for bounty, upon execution of an indemnity agreement at the processing plant, and receive an artificially-enhanced value paid in excess of market value. (2) They may deliver the hulk to a non-Maryland processor, without bounty, and receive market value only. (3) If they have a certificate of title, or if they have obtained a police certificate authorizing disposal of the hulk, they may deliver it to a non-Maryland processor, for bounty, and receive artificially-enhanced value in excess of market value.

Appellants suggest that this third option provides the solution, if incomplete, to Alexandria's problems engendered by the 1974 amendment. They simply ignore what everyone else seems to understand. First, abandoned, inoperable hulks without engines are rarely, if ever, accompanied by properly-endorsed title certificates. Section 11-1002.2(f)(5), by its express terms, presupposes that the title certificate "is faulty or destroyed" and authorizes disposal of the hulk "without the title". Second, no scrap processor can reasonably expect its suppliers to apply to a Maryland police department, wait an average of three *days* (A. 86A) pending police approval of the application and written notice to putative claimants, and then wait three *weeks* more until the statutory notice expires.[85] Section 11-

[85] Section 11-1002.2(a) and (b), as incorporated by reference in Section 11-1002.2(f)(3). See n.32, *supra* at p. 20.

1002.2(f)(5) expressly exempts hulks from these burdensome procedures. No amount of pleading by Alexandria (A. 81A-82A) is likely to persuade suppliers to ignore that exemption and initiate procedures which are wholly unnecessary. Vehicle sellers are no more inclined to waste their time than they are to overlook a profit. "Since the choice between the simple expedient of executing an indemnity agreement and those of the more time-consuming notice procedures will in many, if not all, instances be made by individuals with no interest in maintaining Alexandria Scrap's economic health and a considerable interest in maintaining their own economic health, the choice which will in most instances be made is rather predictable and almost inevitable." AJS 29a.

Appellants do not address this conclusion. Under their theory, interstate commerce in scrap would be licensed by Maryland police departments (if at all), in their discretion and subject to lengthy quarantine, whereas no such burdens would be imposed upon scrap delivered to plants "physically located and operating" in Maryland. That this manifest discrimination is repugnant to the Commerce Clause surely requires no further citation of authority.

Finally, even if the closing of Section 11-1002.2(f)(5) to out-of-state processors merely diminished the volume of interstate trade, that would not immunize it from the Commerce Clause. In *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), for example, the out-of-state processor continued to export milk from New York under two previously-issued licenses after a third license had been denied. This prompted New York to argue (as Maryland does here), that the processor could continue to export milk under its existing licenses and even increase its supplies, without condition or limit in

quantity. *Id*, 539. This Court, observing that "a buyer has to buy where there is a willing seller," found that denial of a third license would limit access to additional supplies sought by the processor. *Id*, 540. It held that New York's attempt "to *limit* the local facilities for purchase of additional milk so as to withhold milk from *export*", *id*, 531, was "imposed for the avowed purpose and with the practical effect of curtailing the *volume* of interstate commerce to aid local economic interests", *id*, 530-31 (italics added). See *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 537-38 (1964).

The 1974 amendment to Section 11-1002.2(f)(5) is not rescued from invalidity merely because less convenient methods theoretically may be used by Maryland suppliers to export their hulks from Maryland in reduced quantities. That Appellants would relegate interstate commerce to secondary or seldom-used routes, while local business continues to travel the main "avenue", constitutes a rather telling admission that the amendment is a calculated discrimination, "leading inescapably to the suppression so intended." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

C. The Amendment to Section 11-1002.2(f)(5) Was Properly Invalidated, in View of the Absence of Compelling Justification for the Discrimination Against Interstate Commerce and the Plain Existence of Reasonable Non-Discriminatory Alternatives.

In view of the direct conflict between the Commerce Clause and Section 11-1002.2(f)(5), as amended, only a strong showing of adequate justification could suffice to preserve the latter. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 71 (1963). The formulation declared in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), provides:

> If a *legitimate* local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the *nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.*

Id. 143 (italics added). Discrimination cannot be justified by plausible generalities. There must be a demonstrable nexus between the asserted local interest and the requisite necessity for employing discriminatory means to protect such interest. See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935). To permit Maryland "to adopt a regulation not *essential* for the protection of local [environmental] interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause". *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (italics added).

The question, then, is whether there is a legitimate local interest to be protected by the discrimination and whether it could be promoted by alternative means with a lesser impact upon interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). No answer is forthcoming from Appellants. In the District Court, they failed to offer any satisfactory reasons for the discrimination but did tender two untenable excuses: "*viz.*, (i) to help limit the payment of bounty monies to Maryland vehicles abandoned in Maryland, and (ii) to insure that those companies which receive a bounty on the basis of an indemnity agreement are fully subject to the laws of Maryland and available to the judicial processes of her courts".[86] However, during the course of

[86] Memorandum in Support of Motion to Dismiss (R. 42).

oral argument (A. 96A-115A), these two assumptions paled under scrutiny. In its opinion, the District Court declared that "neither of those two interests are in any rational manner advanced by the 1974 amendment" (AJS 19a) and elaborated its reasons in detail (AJS 19a-22a).

On this appeal, these two assumptions are not seriously advanced, but merely stated (Br. 29), along with two new "reasons" not suggested below. Because Appellants do not deem any of those points, new or old, to be worthy of consideration in the context of the Commerce Clause, neither do we. Suffice it to say that those points bear scant relation to the avowed and practical discrimination practiced under the 1974 amendment. The wholesale exclusion of licensed and law-abiding scrap processors from the protections of Section 11-1002.2(f)(5), as amended, solely because their plants are not "physically located and operating" in Maryland, is an unconstitutional solution to any problem, real or imagined, which might be suggested by Appellants. In matters affecting interstate commerce, Maryland may not wield her power in blunderbuss fashion.

That much was established in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935):

> [T]he evils springing from uncared-for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere; milk may be excluded if necessary safeguards have been omitted; *but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to the producers in another*, in the faith that augmentation of prices will lift up the level of

> economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. * * * *Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between the states.*

Id, 524 (italics added). See *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 374 n.9 (1964); *Toomer v. Witsell,* 334 U.S. 385, 406 (1948).

The message is plain, lucid, and now firmly embedded in our constitutional law: a state cannot discriminate against interstate commerce, "even in the exercise of its unquestioned power to protect the health and safety of its people, *if reasonable nondiscriminatory alternatives,* adequate to conserve legitimate local interests, are available". *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951) (italics added). See *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 71, 73 n.7, 74 n.9 (1963); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 375 n.9 (1964). Such alternatives are available to Maryland, but it has failed to employ them.[87] Because Maryland chose instead to discriminate against interstate commerce in unprocessed scrap, its legislative instrument was properly invalidated under the Commerce Clause.

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[87] For example, the mere amendment of Section 5-205 of the present statute, so as to limit the payment of bounties to vehicles abandoned in Maryland (and thereby close the loophole now open to local processors), would have satisfied both the asserted objectives of the State and the Commerce Clause of the Constitution. AJS 30a-31a. See *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 74 n.9 (1963).

II. THE EQUAL PROTECTION CLAUSE FORBIDS A STATE, HAVING LICENSED ALL SCRAP PROCESSORS MEETING PRESCRIBED CRITERIA, TO ASSERT A DISCRIMINATORY PREFERENCE IN FAVOR OF LICENSEES WITH PLANTS "PHYSICALLY LOCATED AND OPERATING" WITHIN ITS BORDERS AND TO DENY TO LICENSEES SIMILARLY SITUATED IN EVERY RESPECT (OTHER THAN PLANT LOCATION) THE RIGHT TO COMPETE WITH THE FAVORED CLASS ON EQUAL TERMS.

The provisions of Section 11-1002.2(f)(5), as amended, creating a state-sanctioned indemnity agreement and affording an expeditious method of qualifying for bounty payments, work an invidious and heavy-handed discrimination against licensed scrap processors with out-of-state processing facilities. Even when viewed from a sympathetic perspective, the amending legislation makes a classification which is unrelated either to differences between instate and out-of-state processors or to the avowed purpose of the statutory program. It is patently arbitrary and is grounded upon no rational basis. Such a discrimination is odious to the Equal Protection Clause.

The three-judge District Court ruled that Section 11-1002.2(f)(5) violated the Equal Protection Clause because it "creates a classification which has no basis in reason". 391 F. Supp. at 58 (AJS. 22a). Appellants now challenge this ruling on two grounds. They assert that the District Court erred in determining that the Equal Protection Clause was infringed by the 1974 amendment. Additionally, and for the first time, they suggest that Alexandria, as a non-Maryland corporation, is not entitled to the equal protection of its laws.

A. An Out-Of-State Scrap Processor Meeting Prescribed Criteria and Becoming Licensed by a State is "Within the Jurisdiction of the State" and Cannot be Denied the Benefits of the Equal Protection Clause In Connection with the Business for which It Was Licensed.

Insofar as Alexandria's entitlement to the benefits of the Equal Protection Clause is concerned, Appellants' contentions are frivolous. Maryland's regulatory scheme for licensing of scrap processors makes specific provision for the licensing of scrap processors not geographically located within the State. MARR § 11.02.05.45 (A. 36A). It is stipulated that Alexandria has been licensed as a scrap processor since the inception of the program and that it is in full compliance with MARR § 11.02.05.45 by maintaining an office in Silver Spring, Maryland (A. 58A). Admittedly, a state may impose preconditions upon the licensing of foreign corporations or even exclude them from licensing altogether; but once it has licensed them, foreign corporations stand on the same constitutional footing under the Equal Protection Clause as the state's own domestic corporations. *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507 (1926).

In the present instance, the Motor Vehicle Administration of Maryland has issued licenses to Alexandria and six other scrap processors not located in Maryland. It is inconceivable that Maryland could establish a scheme with specific provision for licensing non-domestic corporations, issue licenses to such corporations and transact business with them, require such corporations to maintain offices within the state, deal

with such corporations directly over a period of years for purposes of regulation, inspection, and supervision, and then assert for the first time on this appeal that the foreign corporations thus licensed are not "within its jurisdiction".

Appellants' reliance upon *Blake v. McClung*, 172 U.S. 239 (1898), to support the concept that Alexandria is not "within the jurisdiction" of Maryland, is misplaced. Shortly after that portion of the Court's opinion quoted by Appellants (Br. 24-25), Mr. Justice Harlan explained that the foreign corporation in question did not appear "to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents". *Id.* 172 U.S. at 261. This contrasts directly with the establishment by Alexandria, pursuant to M.A.R.R. § 11.02.05.45, of an office in Maryland which specifically brings it within Maryland's jurisdiction. *Md. Ann. Code* (1974) Cts. & Jud. Proc. Art., § 6-102(a).[88] In fact, the only purpose of requiring out-of-state scrap processors to maintain such offices would seem to be for the purpose of establishing Maryland's jurisdiction over them. By licensing foreign corporations as scrap processors, Maryland has brought them within its jurisdiction and must afford them equal protection in the conduct of that business. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 462 (1937). Maryland cannot now deny Alexandria, in its

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[88] §6-102(a) provides that "[a] court may exercise personal jurisdiction as to any cause of action over a person . . . served with process in . . . or who maintains his place of business in the state". Additionally, the District Court below found Alexandria within the reach of the Maryland "long arm" statute, *Md. Ann Code* (1974), Cts. & Jud. Proc. Art. §6-103(b)(1). (AJS. 20a).

status as a licensed scrap processor, the constitutional benefits to which it is entitled.[89]

B. Once a State has Licensed All Scrap Processors Meeting Prescribed Criteria, the Equal Protection Clause Bars the State from Asserting a Discriminatory Preference in Favor of Licensees with Plants "Physically Located and Operating" Within its Borders and Denying its Licensees Similarly Situated in every Respect (Other than Plant Location) the Right to Compete With the Favored Class On Equal Terms.

Section 11-1002.2(f)(5) divides licensed scrap processors into two classes. The line of demarcation is drawn at the Maryland State line. Those licensed processors whose processing plants are located within the state may acquire eight year old inoperable vehicles from virtually anybody through an expeditious procedure. Those licensees whose plants are not so situated are denied that procedure.[90] The District Court rightly found that this classification scheme could not withstand Alexandria's equal protection challenge.

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[89] Cf., *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921), where this Court ruled that, if the foreign corporation was doing business within the state, it was entitled to the protections of the Equal Protection Clause to save it from a discriminatory tax scheme but, even if it was not doing business within the State, it was entitled to protection under the Commerce Clause from the same discrimination.

[90] The District Court below also pointed out that the 1974 Amendment would deny out-of-state processors the statutory protections for claims of owners or alleged owners provided by indemnity agreements even if such indemnity agreements were obtained (AJS. 15a).

This Court has prescribed two principles for the examination of statutes in the light of the Equal Protection Clause. First, "distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved . . . [b]ut distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences'. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 463". *Morey v. Doud*, 354 U.S. 457, 466 (1957). Second, "[a] classification . . . must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415". *Reed v. Reed*, 404 U.S. 71, 76 (1971). " 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38; *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 462." *Morey v. Doud, supra*, 354 U.S. at 464. In addition, "this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972). See, *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). However, "[t]his Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

Maryland has deemed that the most efficient way to rid its territory of abandoned vehicle hulks is to

encourage their recycling by heavy industry. A special class of licensed scrap processors was commissioned to accomplish this task. The regulatory agency, the Motor Vehicle Administration, has enlisted out-of-state processors to effectuate the legislative purpose. Although the state may, without running afoul of the Equal Protection Clause, impose unequal burdens on a foreign corporation's ability to partake of the state's benefits, that same Clause prohibits discriminatory action once a state has extended that privilege.[91]

That there is no genuine difference in the operations or businesses of out-of-state and in-state licensed scrap processors is self-evident from the Administration's own regulations (A. 35A-38A). Those regulations uniformly require licensed processors to maintain an office and records at a fixed location,[92] and to be equipped with approved apparatus capable of rendering scrap acceptable to any smelting operation.[93] The procedures through which each licensed processor receives automobile hulks and applies for the bounty are also uniformly applicable to all licensed processors.[94] It is not possible, therefore, to base the distinction made in Section 11-1002.2(f)(5), as amended, on any difference in the character of the business engaged in by licensed processors. This should be contrasted with *Administrator v. Vogt*, 267 Md. 660, 299 A.2d 1, 9 (1973), where the very real differences between the automobile wrecking business and the business of scrap processing were discussed.

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[91] See discussion *supra*, at 80-82.

[92] *M.A.R.R.* §§11.02.05.41-.43 (A. 35A).

[93] *M.A.R.R.* §11.02.05.44 (A. 36A).

[94] *M.A.R.R.* §§11.02.05.47-.54 (A. 36A-38A).

Nor can the discrimination made be logically connected with any permissible legislative purpose.[95] Section 11-1002.2(f)(5), as amended, is part of a comprehensive scheme implemented under Maryland's police power to expedite the removal of automobile hulks in accordance with the legislature's belief that those objects constituted a health and safety hazard. *Administrator v. Vogt, supra.* Although the efforts of the basic legislation in this regard are laudable, they are in no sense promoted by irrational discrimination. During the entire course of these proceedings Appellants have advanced no rationale sufficient to support the statutory discrimination contained in the 1974 amendment.

The Attorney General seems to feel that no rational explanation is required to justify the discriminatory amendment; a mere listing of four theoretical reasons is all that is deemed necessary (Br. 29). "But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme". *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). No satisfactory and reasonable explanation is forthcoming for the simple reason that none exists. The proffered justifications are untenable.

Before the District Court, Maryland relied upon two justifications for the invidious discrimination against scrap processors with out-of-state facilities: "*Viz.*, (1) to help limit the payment of bounty monies to Maryland vehicles abandoned in Maryland, and (2) to insure that those companies which receive a bounty on the basis of

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[95] A legislative purpose to exclude interstate commerce or to impose restrictions on interstate travel is clearly impermissible. *E.g., Shapiro v. Thompson*, 394 U.S. 618 (1969).

an indemnity agreement are fully subject to the laws of Maryland and available to the judicial processes of her courts".[96] (AJS. 19a). Appellants now put forward two additional justifications: that the classification insures that the indemnity agreement is enforceable and that it tends to limit the amount of money which Maryland would be obligated to pay out of its limited resources to non-taxpayers (Br. 29). These two points were *not* raised below. Even assuming their propriety, however, none of these interests are advanced in any rational manner by Section 11-1002.2(f)(5), as amended.

The contention that the statutory scheme tends to insure that bounty payments will be made only on automobiles abandoned in Maryland is completely unsupported in the record. In the first place, Appellants have offered no factual support for their dual assumptions that (1) non-resident processors are more likely than Maryland processors to claim bounties for vehicles abandoned in places outside Maryland or that, (2) if such a problem exists, it has reached such significant proportions as to warrant the discontinuance of all bounty payments to the former without imposing controls on the latter.[97] In addition, the statute manifests absolutely no public policy to "limit the payment of bounty moneys to Maryland vehicles

[96] Memorandum in Support of Motion to Dismiss (R. 42).

[97] Obviously, even if isolated abuses of the bounty program may be attributed to scrap processors, local or non-resident, "this problem is addressed to the matter of administrative enforcement rather than discriminatory legislation". *Administrator, Motor Vehicle Administration v. Vogt, supra,* 267 Md. at 675-76, 299 A.2d at 9. Only a statistically-significant disparity between the groups could qualify discrimination of the sort attempted here.

abandoned in Maryland".[98] A careful examination of the entire legislative program does not disclose any such limitation, express or implied. While the provisions of Section 11-1002.2(f)(5), as amended, (and Section 5-205) do insist that the vehicle must have been formerly titled in Maryland in order to qualify for the bounty, this is hardly the equivalent of the statutory command to restrict bounties to vehicles abandoned on Maryland territory.[99]

It seems perfectly ridiculous for the Appellants to defend the amendment on the ground that discrimination is essential to vindicate a policy which neither the Maryland legislature nor the Administration has seen fit to adopt. As matters now stand, vehicles abandoned outside of Maryland may be delivered with indemnity agreements for bounty to Maryland processors, but not to their licensed out-of-state competitors.[100] The net

[98] During argument below, the Assistant Attorney General admitted "that the statute does not specifically provide that vehicles must have been abandoned in Maryland in order to qualify for the bounty" (A. 96A).

[99] During the hearing before the District Court the following discussion occurred between the Assistant Attorney General and the Court (A. 102A):

> (Mr. Garrett) I think the Legislature only intended that we clean up the streets of Maryland.
> (Judge Miller) But that is not what the statute says.
> (Mr. Garrett) No it doesn't, and it would be better that it did say that . . . .

[100] There was considerable colloquy below between the Court and the Assistant Attorney General regarding the scope and purpose of Section 11-1002.2(f)(5), as amended (A. 96A-115A). After admitting that an in-state processor could recover the bounty on a vehicle recovered outside of Maryland (A. 99A), the Administrator's counsel suggested that, were it not for this litigation, he would issue a "formal Opinion" advising the Motor Vehicle Administration "that they should refuse to pay a bounty on any vehicle abandoned

effect of this apparent loophole is to perpetuate the discrimination in favor of local processors which now, more than ever, are free (from outside competition as well as from statutory restraint) to pursue and acquire Maryland vehicles abandoned in other states and receive full bounty for doing so. It would even be possible under the present statute for a processor "whose plant is located and operating" in Maryland and which operates one or more plants located elsewhere to claim bounties for Maryland-titled vehicles abandoned outside Maryland and delivered to a non-Maryland plant.

The original situs of an abandoned car bears no rational relation to the location of the processing plant to which it is delivered. Time and distance and competition and value, not state lines, determine where the hulk will be delivered for processing. Whatever reasons may have existed for closing a perceived loophole to non-resident processors, no attempt has been made to demonstrate what purpose was served by preserving the same loophole intact for the benefit of Maryland processors similarly situated.[101] If the claimed evil really existed at all, the exclusion of non-resident processors from the benefits of Section 11-1002.2(f)(5), as amended, is an unconstitutional solution.

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outside of the State of Maryland" (A. 100A). He admitted that there was no such regulation presently in existence and that the indemnity agreements used by in-state processors do not show the origin of the cars (A. 100A).

[101] If this "loophole" was indeed a matter of real concern to Maryland, then it certainly would have moved to cut off the loophole from in-state processors as well as from those out-of-state; its failure to do so implies, in fact, an intention to discriminate invidiously against out-of-state processors. Cf. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 71 (1963).

The second proposition, i.e. that the 1974 amendment would insure that bounty recipients are fully subject to the laws of Maryland and amendable to its judicial process, is specious. The fact that Alexandria's principal place of business is outside the territorial limits of the state neither lessens the administrative and judicial control which Maryland may assert over those enterprises which she licenses, nor increases the state's burden of enforcing the regulatory scheme. The validity of the state's right to inspect the premises and the records of licensed scrap processors, wherever located, is not questioned. As a condition precedent to licensing, Alexandria and other non-resident processors have been obliged to establish offices in Maryland, to comply with comprehensive regulations promulgated by the Administration, to maintain accurate and complete records, and to submit to inspection by the Maryland authorities.[102] These processors are fully subject to the laws of Maryland and to its judicial processees to the same extent as local processors as to all transactions for which they are licensed.[103] Any attempt to relate the challenged legislation to jurisdiction over bounty recipients is thus clearly irrational.

For the first time, Appellants now raise as a third purported justification that Section 11-1002.2(f)(5), as amended, insures that indemnity agreements will be enforceable. This proposition is wholly incomprehensible. An indemnity agreement is a contract between a

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[102] See, e.g., Sections 5-202(4) (A. 18A), 5-206 (A. 22A) and *M. A. R. R.* §11.02.05.45 (A. 36A). At oral argument below, the Assistant Attorney General admitted that the amendment had nothing to do with inspecting the facilities of out-of-state processor (A. 108A). See opinion of the District Court (AJS. 22a).

[103] See discussion *supra*, at 80-82.

scrap processor and the processor's supplier. In it the supplier states that he has legal ownership of the vehicle and is authorized to deliver it to the processor, that he will indemnify the processor from any liability arising from its destruction, and that he warrants compliance with the Maryland law in the sale of the subject vehicle to the processor.[104] The indemnity agreement is plainly a contract *for the benefit of the scrap processor.* The location of his plant, whether inside or outside of Maryland, has no relevance to the agreement's enforceability.[105] All licensed scrap processors are amenable to Maryland's jurisdiction for purposes of judicial process.[106] This assures that Maryland citizens claiming injury through the destruction of hulks, may obtain judicial relief against scrap processors in Maryland courts. Whether an out-of-state processor might, in turn, have recourse against his supplier for breach of an indemnity agreement, however, has no rational relation to any asserted purpose of the Maryland legislation. Since Section 11-1002.2(f)(5) requires Maryland processors to file their indemnity agreements with the Motor Vehicle Administration, the same requirement, if extended to non-Maryland processors, would obviously eliminate any question of enforceability.

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[104] Stipulation ¶14 (A. 60A). Sample of the indemnity agreement may be found in the record as exhibits to the Stipulation of Facts (R. 261-266.)

[105] Alexandria relies upon interstate commerce for its Maryland bounty business. Stipulation ¶6 (A. 76A). An indemnity agreement between Alexandria and a Maryland supplier is therefore enforceable as a contract in interstate commerce. *Allenberg Cotton Company, Inc. v. Pittman,* 419 U.S. 20 (1974).

[106] See discussion *supra,* at 80-82.

The final argument in support of the discriminatory classification is that it will effectively limit the money which Maryland must pay to non-taxpayers out of its "limited resources". This argument ignores the fact that bounties are paid out of a special earmarked account, the Abandoned Vehicles Fund, to be generated by a one dollar charge for the title of each motor vehicle titled in Maryland.[107] Alexandria's status as a Maryland taxpayer is irrelevant since no general tax revenues are used for the program. There is nothing in this record which in any way indicates that the Fund is in danger of becoming depleted. Of course, Maryland has the right to preserve the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures for the bounty program by reducing the bounty, by changing the eligibility standards, or by adopting any other non-discriminatory approach. If the State deems the program to be no longer in the public interest, it may abolish it in its entirety. What Maryland cannot do, however, is to engage in invidious discrimination by creating classifications which bear no rational relation to the legislative program. *Graham v. Richardson,* 403 U.S. 365, 374-75 (1971).

In addition, the argument ignores the realities of the market place. The discrimination achieves no savings. When a supplier obtains an abandoned vehicle eligible for bounty under Section 11-1002.2(f)(5), he will no longer deliver the vehicle to an out-of-state processor and thereby forego a bounty-enhanced price; rather, he will deliver the vehicle to a Maryland processor who can and will pay him the full bounty-enhanced price. The end result is the same: the bounty will be paid from the Abandoned Vehicles Fund and most of it will

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[107] The account is set up by Art. 66½, §3-830. See footnote 38 *supra,* at 24.

immediately be passed on to the supplier, whether he be from Maryland or out-of-state. Thus, this purported rationale merely focuses upon the invidious nature of Maryland's classification and does not rationally support any legitimate state purpose.

Appellants disregard the true nature and extent of the discrimination caused by the 1974 amendment to Section 11-1002.2(f)(5). That section, as amended, obviously deters Alexandria's regular Maryland sources of supply from bringing eligible vehicles from Maryland to its plant in Virginia — a result contrary to the stated legislative design of the bounty program. At the same time, the effect of the classification as drawn is to encourage both out-of-state and Maryland towing services to search the surrounding states for eight year old inoperable hulks titled in Maryland and to bring them into Maryland where the value of these hulks has been "artificially enhanced". This second effect is also out of phase with the legislative scheme. Thus the rationales advanced in support of discrimination are illusory and patently insubstantial grounds for inflicting economic hardships on licensed processors serving the Maryland market from out-of-state plants.[108]

The discrimination worked against Alexandria is much like that struck down in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968). That case involved the denial of non-profit tax status[109] solely because of

[108] This form of discrimination is similar to that which is based upon an unfounded hypothesis, e.g. that an old established business will retain certain characteristics which allow its exemption from regulation through a "grandfather" provision. *Morey v. Doud*, 354 U.S. 457, 467-68 (1957). See, *Dukes v. City of New Orleans*, 501 F.2d 706 (5th Cir. 1974), probable jurisdiction noted, 95 S. Ct. 1556 (No. 74-775), argued Nov. 11, 1975.

[109] The statutory program in our case, of course, is grounded upon state police power.

WHYY'S foreign incorporation. In its *per curiam* opinion, this Court found that the situation was not one where "the exemption was withheld by reason of the foreign corporation's failure or inability to benefit the State in the same measure as domestic non-profit corporations", and that the State had not "advanced any other distinction between [WHYY, Inc.] and domestic non-profit corporations which would justify the inequality of treatment". *Id*, 393 U.S. at 120. There was no suggestion that the State's burden of determining non-profit status within the State was more difficult in the case of a foreign corporation than in that of a domestic corporation. Therefore, this Court concluded that WHYY, Inc. "has not been 'accorded equal treatment, and inequality is not because of the slightest difference in [New Jersey's] relation to the decisive transaction, but solely because of the different residence of the owner'." 393 U.S. at 120. In the present situation, there has been no demonstration that Alexandria does not benefit that State to the same degree as local scrap processors or that there are any distinctions between Alexandria and the local scrap processors which would justify the inequality of treatment. Indeed, Maryland has even disclaimed any intimation that the 1974 amendment had anything to do with inspection of processors.[110] Just as the discrimination against WHYY, Inc. was based solely upon its foreign incorporation, Maryland's discrimination against Alexandria is based solely upon Alexandria's foreign location.

The suggestion by the Maryland Attorney General that Alexandria's proper redress is in the legislature rather than the courts "and the appropriate legislature in this case is that sitting in Richmond, Virginia" (Br.

[110] See discussion *supra*, at 89.

at 32) defies all reality.[111] Alexandria has been licensed by Maryland as a scrap processor and has become entitled to equal protection under Maryland laws insofar as its activities pursuant to such license are concerned.[112] Alexandria is entitled, by its licensure, to recover bounties on eligible vehicles to the same extent as local Maryland processors. If local processors can only claim bounties on eligible vehicles recovered in Maryland, then Alexandria claims entitlement to no more than that same right. Maryland is not excused by mere conjectures from its obligation to give equal protection within its own jurisdiction. "It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do". *Missouri v. Canada,* 305 U.S. 337, 350 (1938).

Although in some instances this Court may assume a reasonable set of facts upon which the legislature might have based its judgment (the so-called "presumption of constitutionality"),[113] that presumption loses much of its vigor when a statutory classification selects a closed class of businesses for special preference. *Morey v. Doud,* 354 U.S. 457, 467 (1957). The Maryland statute does not specify the one enterprise given legislative favor, but it does describe a closed group of nine readily-identifiable processors "physically located and operat-

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[111] There is no rational reason to expect that the Commonwealth of Virginia would have any proper interest whatsoever in setting up a bounty program to cover abandoned Maryland vehicles recovered in Maryland.

[112] See discussion *supra,* at 80-82.

[113] See *McGowan v. Maryland,* 366 U.S. 420 (1961) (court affirmatively identified a number of rational bases upon which legislature could have acted); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911) (same).

ing" plants with her borders. Functionally these advantaged enterprises are similar to those in *Morey v. Doud* since the in-state scrap processors are dominated by one or two corporations.[114] As the District Court noted, "the cost of heavy equipment required to set up a scrap processing plant does have the practical effect of discouraging the entry of new competitors." Stipulation 10 (AJS. 22a). Section 11-1002.2(f)(5) effectively establishes a tightly-limited membership which stands to benefit economically from Alexandria's exclusion. Viewed from the perspective of those economically injured rather than of those economically benefited, the statutory restriction is primarily directed against a single processor and the "converse" situation mentioned in *Morey v. Doud,* 354 U.S. 457, 467 (1957) has been created. The limiting of the otherwise generic class flows from by the fact that all other licensed out-of-state processors are located in Pennsylvania and are said to utilize the Wreckers' Certificate procedure.[115] If Alexandria is the only licensed non-Maryland processor utilizing indemnity agreements, it alone has been harmed by the 1974 amendment. This statutory discrimination, caused by a statute that is directed against only one licensed company, contravenes the

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[114] It is not difficult to ascertain from the statistics who has benefited from the exclusion of out-of-state processors. Stipulation, Table VI (A. 72A) shows that the overwhelming bulk of the Maryland-located processing business is in the United Iron & Metal, Inc., and Brooklyn Salvage & Waste Co.

[115] The Appellants state that "[t]he Pennsylvania scrap processors participating in the Maryland program [use] Wreckers' Certificates instead of indemnity agreements." (Br. 7, n.13). This indicates that the Pennsylvania scrappers deal with licensed wreckers, rather than the unlicensed towing services which may not use Wreckers' Certificates. (Br. 6, n. .7).

Equal Protection Clause. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 114-15 (1901).

Under no standard previously articulated by this Court may the amendment to Section 11-1002.2(f)(5) withstand the Equal Protection Clause. Maryland has not justified the discrimination inherent in that amendment. Nor has it explained how its classifications have any fair or substantial relationship to the basic object of the legislation. Even the minimal standard "that a statutory classification bear some rational relationship to a legitimate state purpose," *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164, 172 (1972), has been dishonored. This Court may not uphold discriminations "supported by mere fanciful conjecture" and cannot let them "stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 462 (1937). The District Court, composed of three judges drawn from Maryland practice, found unanimously that even with "every factual inference in [Maryland's] favor, that statutory provision creates a classification which has no basis in reason." (AJS. 22a).

This case is not a situation of a out-of-state business seeking protections from the hazards of competition within; rather, Maryland is seeking to protect its local businesses from the hazards of competition from without.[116] The discriminatory amendment has, by purposeful and invidious classification, effectively excluded Alexandria from engaging in competition with

[116] "This is not a case in which the Fourteenth Amendment is being invoked to protect a business from the general hazards of competition. The hazards here have their roots in the statutory discrimination." *Morey v. Doud*, 354 U.S. 457, 468-69 (1957).

scrap processors who, except for location, are identically situated in all respects. Alexandria asks deliverance, not from the general hazards of the market place, but from the specific hazard created by an arbitrary and irrational statute.

III. A THREE-JUDGE FEDERAL COURT IS NOT REQUIRED TO HOLD A FULL-DRESS TRIAL ON THE MERITS BEFORE ENJOINING THE ENFORCEMENT OF AN UNCONSTITUTIONAL STATUTE WHERE, AS HERE, THE INVALIDITY IS APPARENT ON THE FACE OF THE STATUTE, THE MATERIAL FACTS ARE STIPULATED OR UNDISPUTED, THE POINTS OF ALLEGED DISPUTE ARE IMMATERIAL, AND ALL PARTIES ARE ADEQUATELY PREPARED FOR A PROMPT ADJUDICATION OF THE MERITS.

Appellants were fully accorded due process of law[117] when the three-judge District Court granted injunctive relief in compliance with Rule 56, Federal Rules of Civil Procedure, and in conformity with federal equity practice. Alexandria was entitled to a judgment as a matter of law because the 1974 amendment to Section 11-1002.2(f)(5) is inherently violative of both the Equal Protection Clause and the Commerce Clause. Alexandria demonstrated the absence of any genuine dispute as to any material fact through full factual documentation of its case. The allegedly disputed facts raised by Appellants in the Harris Affidavit (A. 84A), and those arguments raised for the first time on this direct appeal, are immaterial to the unconstitutionality of the 1974 amendment.

[117] Appellants speak of due process and invoke the Fourteenth Amendment (Br. 2), but not the Fifth. Certainly no State has deprived these Maryland officials of life, liberty or property, if in fact they are "persons" with standing to raise the due process issue.

A. Alexandria Has Shown the Absence of Any Genuine Dispute As to Any Material Fact

The principal evidence of the unconstitutionality of the 1974 amendment to the Maryland bounty law is the amendment itself. By its terms the amendment violates both the Equal Protection and Commerce Clauses. By documenting its case for enjoining the enforcement of that amendment through stipulated facts and an uncontroverted affidavit, Alexandria showed the absence of any genuine issue of material fact.[118] The District Court correctly granted summary judgment to Alexandria and properly ordered that enforcement of the 1974 amendment be enjoined (AJS. 31a). See *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968); *Doff v. Brunswick Corp.*, 372 F.2d 801 (9th Cir. 1966), *certiorari denied*, 389 U.S. 820 (1967).

Appellants now question whether Alexandria sufficiently documented its claim of damage caused by the 1974 amendment. Yet the record contains a detailed description of the drastic economic trade losses suffered by Alexandria, and the competitive advantages which were suddenly enjoyed by scrap processors with Maryland plants. Affidavit ¶12-15 (A. 73A). It is not disputed that Alexandria's inability to offer its unlicensed suppliers a bounty-enhanced price for hulks eligible for transfer by indemnity agreement caused deliveries of those vehicles to evaporate. Nor do Appellants anywhere dispute the reduction after the effective date of the 1974 amendment in the number of vehicles received by Alexandria from eight unlicensed Maryland towers. Affidavit ¶13 (A. 81A). Most notably, it is undisputed that the competitive effect of the 1974

[118] The District Court found the 1974 amendment to be unconstitutional by "[n]ot only the terms of the 1974 amendment but also the undisputed facts". (AJS. 29a).

amendment forced Alexandria's suppliers to turn to Maryland-located scrap processors in order to continue obtaining bounty rebates under the indemnity agreement transfer procedure. Affidavit ¶14-15 (A. 81A-82A). The Affidavit contains an abundance of uncontested, supporting evidence.[119] Appellants at no time attempted to rebut the inexorable conclusion: the 1974 amendment drastically impeded Alexandria's trade in hulks and substantially damaged its business while conferring reciprocal benefits upon Maryland scrap processors.[120]

The Affidavit, as well as the Stipulation, provides sufficient information as to the effect of the 1974 amendment upon commerce in hulks. Of course, Appellants had ample opportunity to supplement this information if they felt that more was necessary to aid the District Court in arriving at a proper determination. They elected not to do so, despite their statutory access to *all* of the records of *all* 16 scrap processors licensed and competing for hulks in the Maryland market. Appellants obviously cannot contest the stipulated facts. Nor did they choose to contradict Alexandria's sworn factual assertions regarding the dimensions of that commerce or its trade experience following the

[119] *See* Statement of the Case, *supra* at 35-38.

[120] The discriminatory terms of the 1974 amendment violate the Commerce Clause because they apply to a substantial amount of goods conceded to be in interstate commerce. Alexandria need not show actual damages in this analysis; threatened harm suffices. In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), for example, this Court enjoined the enforcement of a West Virginia statute which would have diminished the natural gas supply available to Pennsylvania and Ohio. The suits were brought only a few days after the West Virginia statute became effective. In the present case the right to injunctive relief is even stronger, for Alexandria was not only threatened with irreparable injury, but was extensively harmed in fact.

amendment. The effect is that the uncontradicted statements contained in Alexandria's affidavit may be taken as true, regardless of Appellants' failure to stipulate to them. *First Nat. Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). This truth survives on appeal, whether or not Appellants are presently unhappy with the undisputed facts contained in the record before this Court. These undisputed facts[121] raise an inescapable conclusion: Alexandria's trade in old cars is a substantial part of its interstate scrap metal trade,[122] and by discriminating against Alexandria and other non-Maryland scrap processors, the 1974 amendment substantially burdened interstate commerce.

Appellants have proffered no rebuttal evidence. The Harris Affidavit is especially barren of factual material, which confirms Appellants' inability or unwillingness to marshal any evidence which would produce a contrary result.[123] All of the facts bearing upon the material issues of this case were readily available to them. The Administration has statutory authority to inspect the records of Maryland-licensed scrap processors, and to require by regulation the reporting of

[121] *See* Statement of the Case, *supra* at 6-9.

[122] The District Court property found as a fact that Alexandria's trade in old Maryland cars was substantial: "Plaintiff herein has asserted, for example, that 40% of its total requirement for unprocessed scrap is satisfied by vehicles delivered from Maryland and that a substantial part of the plaintiff's dealings with old cars is derived from plaintiff's operations related to the Maryland statute. Defendants have not admitted those allegations but even so it is apparent that the movement of vehicles across state lines involving plaintiff is substantial". (AJS. 23a).

[123] Correspondence filed of record (A. 87A-91A) indicates the recognition by all concerned of the need for thorough and complete documentation.

information. Section 5-206 (A. 22A); M.A.R.R. § 11.02.05.43 (A. 35A). During this litigation, Alexandria twice invited Appellants to inspect its plant and examine its records.[124] Appellants have computers, inspectors and complete record-systems necessary to assemble data concerning the impact of the 1974 amendment and the pattern of interstate commerce in bounty-eligible hulks, but they chose not to do so. Their failure to take advantage of opportunities for discovery or to proffer evidence particularly within their control, or even to request additional time for doing so, precludes this Court from finding a genuine dispute where none presently exists on this record. See, e.g., *Robin Construction Co. v. United States,* 345 F.2d 610, 614 (3d Cir. 1965); *Schneider v. McKesson & Robbins, Inc.*, 254 F.2d 827, 830-31 (2d Cir. 1958). In their belated search for a genuine issue, Appellants bring nothing to surface which would require a full trial on the merits. *See,* e.g., *Kirk v. Home Indemnity Co.*, 431 F.2d 554, 560 (7th Cir. 1970); *Riedel v. Atlas Van Lines, Inc.*, 272 F.2d 901, 905 (8th Cir. 1959).

B. Appellants Mistakenly Allege the Existence Of Disputes On Immaterial Points.

The District Court ruled that there was no genuine dispute as to any material fact. This ruling followed a lengthy hearing in which the three judges repeatedly asked the Appellants to pinpoint material facts which they contended to be genuinely in dispute. Their inquiries and the responses thereto speak eloquently from the record (A. 95A-115A).

On appeal, Appellants assert the existence of disputes, but nowhere support their allegations with substantial and material facts of record that refute

[124] *See* letter dated January 16, 1975 (A. 88A-89A).

those presented by Alexandria. For example, the Harris Affidavit ¶5 alleges that indemnity agreements were filed which indicated the District of Columbia as the origin of certain Maryland-titled vehicles and that this alleged fact is "[c]ontrary to the assertion made by Mr. Isadore Gittleson in paragraph five of his Affidavit." Of course, there is no such contradiction. The Gittleson Affidavit does not deny that Alexandria submitted indemnity agreements on Maryland-titled cars recovered in the District of Columbia. However, such vehicles were and are eligible for bounties under the present legislation and regulations.[125] The Harris Affidavit is notably silent as to whether the Administration accepted or rejected the submitted indemnity agreements or otherwise questioned the validity of the submission. Alexandria's affidavit ¶5 simply provided the District Court with an explanation of the statistical tables contained therein.[126] The Harris Affidavit does not controvert it or raise any material fact sufficient to ward off summary judgment. *Griffin v. Griffin*, 327 U.S. 220, 235-36 (1946); *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972).

Appellants also contend that the submission of 56 indemnity agreements for cars abandoned in the District of Columbia rebuts the District Court's finding that "defendants have not proffered a scintilla of factual support for their assumption that non-resident processors are more likely than in-state processors to claim bounties for vehicles abandoned outside of

[125] See the discussion *supra*, at 86-88.

[126] Gittelson Affidavit ¶5 was careful to prevent the very kind of statistical inaccuracy now asserted by Appellants. "In the case of the tower known to haul from two or more jurisdictions, only those indemnity agreements submitted by him which specified that the car came from Maryland were included in the count of Maryland cars." (A. 76A).

Maryland." (AJS. 20a). The fallacies in their contention are several. First, the statutory scheme does not limit bounty eligibility to hulks abandoned in Maryland. Therefore, the quoted "assumption" concerning non-resident processors is immaterial to this controversy. Even if the existence of 56 indemnity agreements was relevant to that assumption, it remains immaterial to the constitutional issue because the assumption is unfounded in law or fact.[127] And even if Appellants' assumption had any validity, the District Court was obviously correct in finding that there was not "a scintilla of factual support for their assumption" (AJS. 20a) that no Maryland processors acquire hulks abandoned outside Maryland.

There is a second fallacy in Appellants' argument. Even assuming *arguendo* that the purpose of the 1974 amendment[128] was to limit bounty payments to cars abandoned in Maryland, the amendment does not further this purpose.[129]

[127] *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968), identified the same error which Appellants make here. In response to a party's reliance on an immaterial theory to create a dispute of fact, the Court wrote: "[T]he showing of a 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law." *Id*, 905.

[128] Appellants' unsupported speculations concerning the legislative intent of the 1974 bounty law amendment also fail to create a genuine issue as to a material fact. *Chesapeake & O. Ry. v. International Harvester Co.*, 272 F.2d 139, 142 (7th Cir. 1959). The District Court was not bound by their declarations of purpose (AJS. 30a). In fact, Appellants disclaim any responsibility for the 1974 amendment or any knowledge as to its authorship (A. 97A-99A).

[129] See discussion *supra*, at 87-88.

Appellants' also allege that a factual dispute arises from a statement in the Harris affidavit ¶8 (A. 85A) that on two occasions prior to the 1974 amendment, Alexandria presented a claim for bounty payment for a hulk which another scrap processor had also certified as having been destroyed. (Br. 35). It is unclear from the affidavit whether Alexandria, or the anonymous scrap processor, or both, were mistaken in their claims or which one of them actually processed the hulk in question. In any event, the assertion is inmaterial, as the District Court observed during the hearing below (A. 107A). Two instances of mismatched vehicle identification number plates (VIN plates) do not affect the validity of Alexandria's statistics showing that the 1974 amendment "drastically altered the market in eight year old or older motor vehicles formerly titled in Maryland," Affidavit ¶12 (A. 80A), nor undermine the District Court's finding that Alexandria suffered a "discernible diminution" in business as a result (AJS. 30a). Moreover, if mismatched VIN plates posed a problem, Appellants do not indicate that Alexandria or any other scrap processor was to blame for it or that the two incidents cited in the Harris affidavit were anything more than isolated occurrences. Furthermore, if the problem violated any statute or regulation, it does not appear to have been of such magnitude as to cause the Administration to revoke licenses, mete out suspensions, or otherwise avail itself of existing enforcement machinery. Appellants cannot escape summary judgment and generate a full-dress trial on the merits by drawing their own unreasonable inferences from immaterial facts. *First Nat. Bank v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968); *Tyler v. Vickery*, 517 F.2d 1089, 1094-95 (5th Cir. 1975).

No issues for trial were presented.[130] Appellants' failure in the District Court to proffer any factual support for their position, while sniping at peripheral details submitted by Alexandria, indicates a demonstrated lack of confidence in the statute which they champion on this appeal. All of the facts were readily available to them, but they apparently felt that Alexandria's showing was ample enough to relieve them of any obligation to come forward with additional materials. If they felt the record was inadequate or genuinely in dispute, it was incumbent upon them to so advise the District Court. Once confronted with a prima facie case, the burden of opposition rested upon *their* shoulders. *First Nat. Bank v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968).

In sum, the decision below was entered on a well-documented record which established an adequate perspective for constitutional adjudication. By examining the record and interrogating counsel, the District Court penetrated all colorable disputes of fact and found that there were none sufficiently material to present a genuine issue for trial. Even so, the District Court adopted a cautious approach to the record and its opinion studiously avoided findings which might be deemed controversial, even though beyond dispute. The decision went against the Appellants, much to their present regret. However, their disappointment should be directed against the "in-the-halls" author of the 1974 amendment, not the party which challenged it or the federal judiciary which declared it to be invalid under two branches of the Constitution.

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[130] Even now, Appellants do not seek a remand for trial on the merits, but ask this Court to enter judgment on the merits in their favor (Br. 43). Their conclusion implicitly concedes that the case is ripe for final disposition on the constitutional issues, without need for further proceedings.

CONCLUSION

For the reasons stated herein, we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

In 1966, the United States Department of Commerce issued a comprehensive study of the scrap metal industry entitled *Iron and Steel Scrap Consumption Problems*. (March, 1966). That study was consulted by the Maryland Legislative Council Committee on Taxation and Fiscal Matters and mentioned in its 1967 Report (A. 41). Another authoritative study is a publication by the United States Bureau of Mines (U.S. Department of the Interior), *Automobile Disposal, A National Problem* [3]1967). Unfortunately, these studies have not been updated and some of their conclusions, now ten years old, may be obsolete or unreliable.

Because of the paucity of recently-published materials on the subject, an article which appeared in the August 1974 issue of FORTUNE was introduced in the record (R. 204). It is reprinted below in its entirety.

FOR SCRAPMEN,
THESE ARE
"TINSEL DAYS"

by Marilyn Wellemeyer

A few months ago, the police were summoned to the country estate of Lewis S. Rosenstiel, founder of Schenley Industries, to investigate a theft reported by the caretaker. But the thieves, it turned out, had not tried to break into any of the residences on the estate, which sprawls over 1,460 acres of New York and Connecticut farm and woodland. Instead, they had stripped copper gutters, downspouts, and flashing from some of the outbuildings, and made off with several hundred pounds of metal. It later developed that they had sold the stuff to scrap dealers for nearly a dollar a pound.

The crime was a sign of the times. Prices for all sorts of scrap began climbing swiftly in the early months of 1973, and in the spring of this year they reached

unimagined highs. In less than a year and a half, the most commonly traded grades of aluminum scrap climbed 145 percent, wastepaper 150 percent, copper 165 percent, and iron and steel 250 percent. The price rises, as might be expected, greatly helped profits in the scrap business. The earnings of several publicly owned scrap companies more than doubled last year. So far this year, a few companies have done even better than that.

The scrap boom has been no fun at all, though, for the industry's customers. The principal customers for scrap are steel mills, copper smelters, and other producers of primary metals and alloys. Last year, when the prices the mills could charge for their products were held down by government controls, the prices they paid for scrap were shooting upward (most scrap dealers were small enough to be exempted from controls). At times, the prices of top-grade copper and aluminum scrap rose above what the mills could charge for the primary metals they produced. And even at high prices, the mills had trouble getting all the scrap they wanted; dealers shipped lots of scrap abroad, where prices were higher still.

When price controls were relaxed, domestic buyers competed even more fiercely for scrap and bid up the prices further. Last spring, Armco, the largest buyer of steel scrap in the U.S., accused the scrapmen of "opportunistic pricing," but that had no discernible effect on the market. As one scrap dealer says: "This is an opportunistic business."

Scrapmen have to be opportunistic to survive. They are subject to even more violent ups and downs than the cyclical industries they depend on for a living. Normally purchased scrap contributes substantially to the content of many finished materials — it makes up about 40 percent of the copper produced in the U.S., 25 percent of the steel, and 20 percent of the aluminum and paper. But when demand for these basic commodities rises quickly, as it did last year, the producers use extra scrap as an incremental source of raw materials. When demand begins to slacken, they cut back on scrap and revert to their customary proportions of scrap and virgin materials.

Charles Merritt, president of Commercial Metals, a Dallas company that supplies ferrous scrap to a lot of steel mills, characterizes the business as "something of a feast or famine." The mills, he says, "either want scrap very badly or they don't want it at all. The price goes up and down like a window shade." This year has seen downs as well as ups. The price of copper scrap broke in May and by mid-July had fallen about 30 percent. Steel-scrap prices plunged precipitously in April, only to bounce right back up to near-record levels.

A striking label for these times in the scrap business comes from Carl Ablon, president of Luria Brothers, the nation's largest scrap company (and a subsidiary of Ogden Corp.). Ablon speaks of these as "tinsel days." Nice shiny profits can be made in times like these, but you can't assume they will last.

Scrap dealers long for stable markets, but recognize that they will probably have to go on living with instability. The industry is fragmented, with thousands of entrepreneurs ranging in size from scrap collectors who own a single truck to a few firms with sales exceeding $100 million. (Total scrap sales reached $8.7 billion in the U.S. last year, or somewhat more than the wholesale volume of household electrical appliances.) The scrapmen's customers are nearly always larger and more powerful then the scrapmen themselves.

Many of the scrap companies are family enterprises handed down from father to son. Nevertheless, capital requirements are low enough to let newcomers break into the market and add to the furious competition. Last year, William Henry Schwartz III, twenty-three, and eight other recent M.I.T. graduates raised $50,000 to start Aardvark International, Inc., which they named for the mascot of their college rugby team. Operating out of a trailer in Camden, New Jersey, they are dismantling destroyers and destroyer escorts and selling the steel plate and nonferrous metals as scrap. "Until I heard about it in a bar in Boston a year ago," Schwartz says, "I didn't even know that a shipbreaking industry existed."

In search of a name

Scrapmen are a proud bunch, and they bristle when the stuff they buy and sell is referred to as "junk." In recent years, indeed, many people in the industry came to regard the word "scrap" as offensive and opted for "secondary material." Lately, even that has come to seem a bit undignified. A trade group called the National Association of Secondary Material Industries has changed its name to the National Association of Recycling Industries.

The industry recognizes three main categories of scrap. In the lingo of the trade, they are called home scrap, prompt-industrial scrap, and obsolete scrap. Home scrap is produced in the mills of the basic industries — trimmings from steel ingots, slag and skimmings from molten metal, and the like. It is generally recycled on the spot. Prompt-industrial scrap is the stuff left over from manufacturing. It is "prompt" in the sense that manufacturers have to get rid of it promptly or be inundated.

Fisher Body plants are heavy producers of prompt industrial scrap. As towering presses stamp out side panels and doors, the steel trimmings fall down a chute onto a conveyor that carries them to a baler house. After bundling, the scrap is loaded on gondola cars and shipped to steel mills. Scrapmen also collect the skeletonlike aluminum sheets left after pieces have been stamped out, the paper trimmed off in the manufacture of envelopes, and the turnings and borings from machine shops.

The mills like prompt-industrial scrap because it is usually clean, of known composition, and chemically unchanged by use or exposure to the weather. But its availability varies with current industrial production, and it can't go far to satisfy incremental needs for scrap caused by a spurt in demand for basic materials. When demand surges, the mills have to increase their intake of obsolete scrap, such as discarded automobile hulks, appliances, plumbing fixtures, and industrial equipment.

Much of the obsolete scrap that dealers buy is brought to them by collectors who tend to slip in and out of the business. Coy Reid, thirty-one, a black man who owns a truck, rides around New York City picking up metal from buildings being torn down, old transmissions and engines from service stations, and whatever else he thinks he can sell. When prices were over $3 a hundredweight for mixed ferrous scrap last winter, Reid brought a load to the Bronx Iron & Metals Corp. three or four times a week. But the high prices soon drew more collectors, the yard dropped the price to $2.25, and Reid cut back to twice a week. "It's nothing but a gamble now," he says. "Too many people got trucks." When prices fall, Reid uses his truck to peddle fish or move furniture, or he goes to work for somebody else.

Old cars account for two-fifths of the ferrous obsolete scrap that reaches the market. In Dallas this spring, trucks loaded with auto hulks were lined up for five blocks outside a Commercial Metals yard waiting to drive over the scale. Commercial was paying $31 a ton for old cars at the time. When the price drops to $20 a ton, the line disappears. "And if you reduce the buying price for a car to much below that level," says Commercial's Charles Merritt, "you'll simply dry up the intake."

High prices for scrap encourage collecting from areas that wouldn't normally be scrap territory. Near Minot, North Dakota, a farmer who buys old tractors and implements from his neighbors accumulated 12,000 tons of scrap over the years. Minot is too remote to supply the market regularly, but when prices climbed last year, Luria sent a crew with cranes from Pueblo, Colorado, to prepare the stuff for shipment to a steel company in Saskatchewan. Some collectors, though, resist being drawn into the market even at high prices. "Shorty" Mayer, a retired auto wrecker north of Mansfield, Ohio, sits on a hoard of some 25,000 heaps. Because he considers the cars his nest egg, he refuses to sell more than a few at a time.

They can't stop buying

More than most businessmen, scrap dealers talk about their business in aphorisms, and one of the most frequently repeated runs: "Scrap is bought, not sold." Dealers tend to be fatalistic about what happens on the sales side. "If the mills don't need scrap," Merritt says, "there is no way you can sell it to them. When you can sell it, what you get is pretty close to the market price — and the market is established by other people. At the grass roots of this business, the difference between a good operator and a bad operator is a fellow who knows how to buy."

A dealer has more control over what he buys than over what he sells. He can turn off the flow of obsolete scrap from collectors by dropping the price. Still, he has only limited control over his purchases of prompt-industrial scrap. Jerome L. Klaff, president of H. Klaff & Co. of Baltimore, has eighteen trucks picking up stainless-steel and nickel-alloy scrap from fabricators. He processes and delivers it to the stainless-steel mills of Armco and Eastment, but when their purchases drop off he goes right on buying. He can't stop buying from the fabricators in bad times or they will sell their scrap to someone else when times are good. "The scrap dealer," says Klaff, "never stops buying."

A dealer has to keep his eyes open. Some collectors are inclined to "topdress" a load of obsolete scrap if they think they can get away with it. "In the course of a day," says a dealer in Brooklyn, New York, "we might buy five tons of dirt we didn't know about." An accurate sense of how much to pay is essential. Angelo Ponte, whose company operates ninety trucks that pick up wastepaper from New York City office buildings and department stores, pays Saks Fifth Avenue about $12 a ton for corrugated boxes and sells the material to paper mills for about $30 a ton. But Ponte *charges* the Empire State Building $7 a ton to carry off lower-grade wastepaper that is mixed with rubbish.

Hazards in Sunday supplements

To turn a profit, the dealer must not only buy scrap astutely, but also process it efficiently into forms that meet the mills' requirements. At the very least, dealers segregate conglomerations of miscellaneous scrap into many precise grades. There are twenty-seven grades of aluminum scrap, forty-four of copper and brass, forty-six of commonly traded wastepaper, and 105 of iron and steel. The specifications cover the chemical content as well as the size of the scrap. If a dealer's shipment does not meet the specs for the grade sold, the buyer is entitled to reject the shipment or reduce the price. In steelmaking, electric furnaces cannot consume ferrous scrap contaminated with large amounts of other metals. Newspaper Sunday supplements containing sample products — e.g., Handi-Wipes or foil-wrapped Alka Seltzer — have clogged drains and contaminated production in paper mills.

Copper refiners are extremely persnickety customers because the standards for their own products are so strict. Says Melvin Kriegel, vice president for purchasing in the cooper division of AMAX: "I have to impress upon new dealers the importance of properly segregating scrap. It takes very little of an impurity to downgrade No. 1 copper, because impurities are measured in parts per million." Primary aluminum producers usually mark their shipments with a "pedigree" indicating the alloy, and they try to buy aluminum of identifiable content when it becomes prompt-industrial scrap.

To identify the content of unmarked alloys, the processors of nonferrous scrap employ spectrographs, chemical analyses, and lots of experience. While magnetic devices can automatically separate ferrous scrap from other metals, one scrap dealer points out that "no machine can separate copper from brass and the different grades of brass. You have to look at it. Nobody has found a substitute for the sight of a human being."

In addition to sorting out the scrap, many dealers process it to increase its quality and ease of handling.

Over the past fifteen years or so, dealers have invested heavily in mechanical equipment. The smallest local dealers may still survive with a crane, a scale, and a few trucks. But a sophisticated yard, capable of handling and processing a large amount of ferrous scrap, might require an investment of $5 million or more.

A big yard may need a railroad siding, a magnet crane for ferrous scrap, forklifts for nonferrous scrap, and a shearing apparatus to cut up heavy material. The alligator shear, which has a stationary lower jaw and a swinging upper jaw, must be hand fed. It is gradually being supplanted by the mechanically fed guillotine shear, which may cost $1 million by the time it's installed. Balers and presses are needed to compact scrap to a density that is practical for shipping. Some yards have sweat furnaces to separate nonferrous metals with different melting points, and briquetters to convert turnings and borings to pellets of convenient size.

There are two principal ways of processing automobile hulks — with a baling press or a shredder. Modern baling presses are sometimes called Goldfinger machines, after the one that appeared in the James Bond movie of that name. In a matter of minutes, the machine can compress a car into a solid mass generally measuring 2 by 2 by 5 feet, which the industry calls a No. 2 bundle. A Goldfinger machine costs anywhere from $250,000 to $650,000.

Everything but the toot of the horn

A shredder costs even more, and does an even better job. Over the past decade, shredders have revolutionized auto processing, and there are now 140 of them around the country. The biggest ones can gobble up 1,000 cars a day. They rip the cars into small, easy-to-handle chunks that, unlike the scrap in No. 2 bundles, are largely free of paint, plastic, glass, or other foreign matter (which are reduced to dust and removed mainly by suction). Shredded ferrous scrap from automobiles brings much higher prices than bundled auto scrap —

recently, $145 a ton versus $56 a ton in Chicago. A big shredder costs anywhere from $2 million to $5 million, but even fairly small yards can get into the business by investing $750,000 in a model that chews up about 300 cars a day.

The first auto shredder was designed by Herman and Samuel Proler, who patented it in 1960. Their company, now called Proler International, has been among the most innovative of scrap processors. The present chairman, Israel Proler, one of nine children, had to quit school after the ninth grade and go to work collecting scrap for his father's City Junk Co. in Houston. In 1947, Israel and his brothers bought the largest baling press in the world from Ford's River Rouge plant (Ford first used it to prepare Model T trade-ins for melting in the company's own furnaces). The Prolerizer, which replaced the press, has turned the destruction of the automobile into an extremely efficient operation. According to Israel Proler, or Izzie as everybody calls him, "We get everything out of the auto but the toot of the horn."

The Prolerizer has caused Proler to adopt some business methods that are novel to the scrap industry. The voracious apparatus requires an assured supply of old cars and a ready outlet for the product it disgorges. As Proler expanded its operations beyond its home in Houston, the company entered into joint ventures with other scrap companies well entrenched in their own territories (the costs of shipping overland make scrap a regional business). Some of the partners — notably Schiavone-Bonomo in New Jersey and Hugo Neu in New York and Los Angeles — were well-established exporters, which helped give Proler access to expanding foreign markets. To get a more dependable supply of old cars than could be assured by the happenstance arrival of collectors, the partners have in some cases set up satellite yards to draw in heaps from remote areas. The partnership arrangement also helps to share the risks on what, for moderately sized companies, is a big investment.

The Prolerizer has proved extremely profitable, especially when the product is shipped into foreign markets. Last spring, the Japanese were paying $160 a ton for Prolerized ferrous scrap exported from Los Angeles. The old cars cost Proler and its partner, Hugo Neu, $60 a ton after being stripped of batteries, tires, and radiators (which are worth enough for auto wreckers to keep). The partners processed the cars for $32 a ton and shipped the scrap to Japan for $35, earning a gross profit of $33 a ton. Those profits have helped Izzie Proler keep a string of Thoroughbreds that race at Saratoga, Aqueduct, and the New Orleans Fair Grounds.

Dealers generally sell their ferrous scrap to brokers, who in turn sell to the consuming mills. Many of the large dealers also operate as brokers themselves. Most mills prefer to buy through brokers rather than maintain their own staffs of traders. For one thing, the brokers have access to more information about the market than the mills do. (Brokers can talk over scrap prices with several mills, but the antitrust laws prevent mill executives from discussing such matters among themselves.)

No business for the nervous

There is no central gathering place, such as a stock or commodity exchange, where scrap brokers meet to trade publicly at disclosed prices. Information on the prices of actual transactions spreads by word of mouth and is ferreted out by the trade press. Brokers keep in touch with what is going on mainly by telephone, talking with their customers and suppliers, evaluating the demand for scrap and the prices at which it can be obtained. In the words of David Joseph of Cincinnati, whose company ranks second to Luria in brokerage, "The broker *is* the market."

Scrap brokering involves continual risk taking. Unlike most stock and commodity-futures brokers, who earn a commission, scrap brokers make their money on their ability to buy low and sell high. Sometimes, to be sure, a broker acts as an agent, in which case he avoids

risk and receives a straight fee; but usually brokers take title to the scrap they buy for their customers. In many cases they have no order in hand when they buy. They canvass their customers' needs, but a customer may tell several brokers how much he wants and no particular broker is assured of the business. To come out ahead, a broker has to make a fairly accurate estimate of how much he can sell, so as not to overbuy or underbuy, and he has to gauge the direction of the market with some skill (or luck). If brokers think prices are going up, they try to be long — i.e., to buy scrap before they get an order. If they think the market will fall, they often sell short.

The most hectic time for a big ferrous-scrap broker comes toward the end of the month, when he bids for prompt-industrial scrap sold by the auto industry. The steel trimmings, compressed into what the trade calls No. 1 bundles, are the Tiffany item of the industry, and the prices paid for them affect the prices paid for other grades of scrap over much of the country. Occasionally, the bids of a single large buyer alter the course of the entire market. Acting as an agent for Armco, David Joseph bid high for industrial bundles at the end of May and helped drive prices up $15 a ton in some key markets. Buyers in the steel industry and some of Joseph's competitors grumbled that he had paid too much or, in the bidder's parlance, "left money on the table." Joseph acknowledges that those bids had "a dramatic effect on the market." But he argues that "Armco needed the bundles. A limited number were available, so we bid prices we thought would buy them."

The seller has thirty days to ship scrap to the customer, and if he's late, the buyer is entitled to cancel the order. Usually, if the prices have gone up, the buyer will require that the order still be filled. But if prices have gone down, the buyer will cancel, leaving the broker with no profit on the transaction.

While the scrap is in transit, the broker has a lot of money riding the rails. It is customary for him to pay the seller 75 percent of the price as soon as the scrap is

shipped and the rest once the buyer receives the scrap and verifies its weight and quality. Only then does the broker collect from the buyer. A big broker will buy and sell as much as $50 million worth of scrap a month, and financing that kind of volume can be costly.

Back when high-quality ferrous scrap was selling for $35 a ton two years ago, the broker used to get a gross margin of about $1 a ton. Now that margin might vary from $2 to $5. But not all of that goes into the broker's pocket. For one thing, his interest costs on financing the purchase of a ton of scrap have more than tripled over the past couple of years, to as much as $1.50 a ton.

Even the feds have it in for them

The scrapmen would like to see some changes in the business, particularly in their relations with customers. The customers, they feel, have forced them to bear a disproportionate share of the risks. As one scrapman puts it: "The steel industry can't live without us, yet they don't want to live with us."

The custom of doing most business on a thirty-day basis is a major peeve. Scrapmen complain that short-term orders give them little opportunity to line up supply and transportation and otherwise plan their operations. But the customers like the present arrangement because it shifts the risk onto the scrapmen. If the mills agreed to buy scrap steadily under long-term contracts, they could not as easily adjust their purchases to fluctuations in demand for their own products. Long-term deals would also reduce their freedom to stock up at a low price and stay out of the market when prices climb.

Scrapmen also feel that some long-standing government policies discriminate against them. For one thing, the U.S. tax laws tend to favor the use of virgin raw materials over scrap. The laws grant depletion allowances to companies that own mineral resources, and they allow capital-gains treatment for profits earned from the sale of forest products. Federal regulation also sets lower railroad rates on virgin materials than on scrap. Lately, the scrapmen have been worrying about what they see as a potential new attack on their business by government. Congress is considering bills

to subsidize waste-disposal plants that would recover metals from garbage, and some scrapmen fear that the recovered material could come onto the market at low prices and cut into their business.

In a time of extraordinary demand for their product, it would seem that the scrapmen would have some leverage to get what they want. Some have, in fact, made a number of sales contracts longer than thirty days. In Chicago, Proler and its partners sell shredded scrap to several steel companies on a sixty-day contract. Luria has some contracts for a year or more that pay costs plus a fee. Because large tonnages and great distances are involved, almost all foreign business is done on a ninety-day basis, and the Japanese have contracted for scrap as long as nine months in advance. But within the U.S., thirty-day terms remain the rule.

Eyeing the greener grass

Enamored of their customers' "easy life," some scrapmen have tried to reduce uncertainty by getting into their customers' businesses. Commercial Metals, for example, has acquired a copper-tube mill in Virginia and steel mini-mills in Texas and Arkansas that are captive customers for scrap. But some customers appear to be envious of the scrapmen, at least during these "tinsel days." Lukens Steel is thinking about getting into the scrap business, and CF&I Steel Corp. has brought shredders for its operations in Denver and Albuquerque. While prices are high, primary producers are also taking what steps they can to hold down their dependence on scrap. Bethlehem Steel recently cited high scrap prices as one reason for canceling plans for new installations that would have used a lot of scrap. And of thirty paper mills now planned for construction in the U.S.. only two will primarily process wastepaper.

All in all, then, uncertainty is a way of life for the scrapmen, and nothing in the offing seems likely to free them from the stresses and strains of the marketplace. As businessmen on the most volatile end of a bunch of cyclical industries, they are going to have to remain opportunistic for a long time to come.

(End)